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In the Court of Claims of the United States.

MOSES WHITMIRE, TRUSTEE FOR THE Freedmen of the Cherokee Nation,
v.
THE CHEROKEE NATION AND THE United States.
No. 17209.

BRIEF FOR THE UNITED STATES ON THE DEFENDANTS' MOTION FOR A REHEARING AND NEW TRIAL.

STATEMENT OF THE CASE.

On September 26, 1891, suit was brought by Moses Whitmire, trustee for the Cherokee freedmen, under special act of Congress giving this court jurisdiction to consider certain rights of the freedmen under article 9 of the treaty between the United States and the Cherokee Nation, of July 19, 1866.

On March 4, 1895, judgment was entered by the court in favor of the freedmen, but the entry of a final decree was suspended until the court could be furnished with definite information as to the number of freedmen entitled to participate in the distribution of the judgment.

On March 18, 1895, judgment was entered by the court for $903,365, and on May 8, 1895, a decree

was entered providing for the distribution of the judgment. From this judgment of the court both the claimant and defendants filed applications for appeal to the Supreme Court, and a motion for a new trial was also filed by the defendants.

On January 30, 1896, the claimant and defendants filed motions to withdraw their applications for appeal, and on February 3, 1896, the decree of May 8, 1895, was vacated and a new and final decree was entered by the court by the consent of all of the parties to the suit.

On September 30, 1907, the attorney for the Cherokee freedmen, Robert H. Kern, filed a motion for the substitution of a trustee, Jacob B. Wilson, in the place of Moses Whitmire, deceased, and for leave to file a supplemental petition to reopen the decree of February 3, 1896, which provided for the distribution of the judgment of the court.

On January 20, 1908, the motion was argued, and on April 20, 1908, allowed by the court.

On May 6, 1908, the supplemental petition of the new trustee was filed, and on March 1 and 2, 1909, the case was argued on this petition. On March 29, 1909, leave was granted to the claimant to proceed under the supplemental petition—the form and extent to be thereafter considered.

On May 17, 1909, the defendants filed a motion for a rehearing and new trial upon the ground that the court erred in not holding that the decree of February 3, 1896, had performed its office, and in holding that the "Kern-Clifton roll" had been confirmed by

Congress, and that the duties of the Dawes Commission in making up the Cherokee rolls under the acts of June 28, 1898, and July 1, 1902, were merely ministerial, and it is upon this motion that the case now comes up for a hearing.

HISTORY OF THE CASE.

By the treaty of July 19, 1866 (14 Stat., 799), between the Cherokee Nation and the United States, ratified July 27, 1866, the Cherokee confiscation laws were repealed and the former owners of the confiscated lands were restored to their homes. (Art. 3.)

The Cherokee Nation on its part agreed "that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein or who may return within six months, and their descendants, shall have all the rights of native Cherokees." (Art. 9.)

Section 5 of the amendments to article 3 of the Cherokee constitution, adopted in 1866, provides that—

> All native born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and

> their descendants who reside within the limits of the Cherokee Nation, shall be taken and admitted to be citizens of the Cherokee Nation. (40 C. Cls., 141.)

Section 2 of article 1 of the constitution of the Cherokee Nation provides that—

> Whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: *Provided, nevertheless,* That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation on memorializing the national council for such readmission.

Under article 17 of the treaty of July 19, 1866, the Cherokee Nation sold certain lands west of the ninety-sixth degree of west longitude, known as "neutral lands," and also sold certain other lands west of the ninety-sixth degree of west longitude under the provisions of article 16 of said treaty to the Delawares, Osages, and other friendly Indians.

By the acts of June 16, 1880 (21 Stat., 248), and May 19, 1883 (22 Stat., 624), Congress appropriated $300,000 each, to be paid into the treasury of the Cherokee Nation as compensation for the said lands belonging to said nation west of the Arkansas River (west of the ninety-sixth degree of west longitude), to "be expended as the acts of the Cherokee legislature direct."

In 1880 a roll was made of the Cherokee Nation for the purpose of showing the number of Cherokees by blood and the number of Delawares, Shawnees, and freedmen entitled to citizenship in the Cherokee Nation under the treaty of July 19, 1866. The names of 1,874 freedmen appear upon this roll. (Instructions of the Commissioner of Indian Affairs to the Commissioners who made the Kern-Clifton roll, Appendix D.)

In accordance with this roll the $600,000 paid for the lands west of the ninety-sixth degree of west longitude were distributed among the Cherokees by blood to the exclusion of Delawares, Shawnees, and freedmen.

By the act of October 19, 1888 (25 Stat., 609), Congress appropriated $75,000 to be distributed *per capita* among the freedmen and their descendants mentioned in the ninth article of the treaty of July 19, 1866, and among the Delawares and Shawnees, in such amount or amounts as would equal the *per capita* payment made to the Cherokees by blood, in accordance with the act of the Cherokee legislature, out of the sum of $300,000 appropriated by the act of March 3, 1883 (22 Stat., 624), and made the said $75,000 a lien upon the lands of the Cherokee Nation west of the Arkansas River, which is the same as the west of the ninety-sixth degree of west longitude.

Under the act of October 19, 1888, and the supplemental act of March 2, 1889 (25 Stat., 980), a commissioner was appointed by the Secretary of the Interior, and a roll was made up of those living on

March 3, 1883, known as the "Wallace roll," which was afterwards in 1890 revised and corrected by two agents of the Interior Department, and was then known as the "corrected Wallace roll," numbering 3,524 freedmen, and upon that roll the freedmen were paid their proportion of the $75,000.

Congress, by section 14 of the act of March 2, 1889 (25 Stat., 1005), authorized the President "to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of west longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands."

On the 19th day of December, 1891, the commissioners appointed under the above act entered into an agreement at Tahlequah with the Cherokee Nation, by article 1 of which it provided that "The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one-hundredth degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by executive order dated August 10, 1869, the tract of land embraced within the above boundaries containing

eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less."

By the second article, paragraph 6 of the agreement, the United States agreed to pay as an additional consideration for the cession and relinquishment of the above lands the sum of $8,595,736.12 in excess of the sum of $728,389.46, the aggregate amounts which had already been appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River, and also in excess of the amount paid by the Osage Indians for their reservation.

The same paragraph also provided that "should the Cherokee Nation determine to distribute said money, or any part thereof, principal or interest, to any of its citizens, per capita, and should the classes of persons provided for in the ninth and fifteenth articles of the treaty of July 19, 1866, claim that in such distribution they have been unjustly or illegally discriminated against, then on complaint made by such persons Congress shall by law authorize a suit in a proper court by and between such classes of persons and the United States and the Cherokee Nation, to determine that question, giving to any party thereto the right of appeal to the Supreme Court of the United States," etc. (S. Ex. Doc. 56, pp. 16, 17, 19; 52d Cong., 1st sess.)

Prior to the agreement of December 19, 1891, Congress, by the act of October 1, 1890 (26 Stat., 636), gave to the Court of Claims jurisdiction to determine

the right of the Delaware and Shawnee Indians and the freedmen to participate in the compensation to be paid to the Cherokee Nation for its lands west of the ninety-sixth degree of west longitude in the following language:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject-matter herein provided for.
>
> SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either sepa-

> rately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have been, or may be, paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of the ninety-sixth degree of west longitude, and which have been, or may be, appropriated and directed to be paid out, per capita, by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

Under the above act the Delaware Indians, through their principal chief, Charles Journeycake, brought suit against the Cherokee Nation and the United States for their share, under the treaty of April 8, 1867, of the proceeds of lands west of the ninety-sixth degree of longitude, leased and sold by the United States. This court held on April 24, 1893, that they were entitled to their proportionate share

of $600,000, the proceeds of the sale of Cherokee lands west of the ninety-sixth degree of longitude, which had been distributed *per capita* among citizens of the Cherokee Nation by blood, under acts of the Cherokee National Council, excluding adopted citizens and their descendants, and that said acts were void and unconstitutional. (28 C. Cls., 281 to 321.) The decision of the Court of Claims was affirmed on appeal to the Supreme Court. (155 U. S., 196.)

The Shawnee Indians, through their principal chief, Johnson Blackfeather, also brought suit against the Cherokee Nation and the United States, under the same jurisdictional act, to recover their proportionate part of the funds which had been distributed *per capita* among the Cherokee citizens by blood to the exclusion of those who were Cherokees by adoption. This court decided on the authority of the Delaware case that they also were entitled to their proportionate share of the $600,000 distributed *per capita* as above stated. No opinion was rendered in the case, but the judgment of the court was affirmed by the Supreme Court at the same time the opinion in the Delaware case was handed down. (155 U. S., 218.)

By section 10 of the act of March 2, 1893 (27 Stat., 640, 641, 642), the agreement between the United States and the Cherokee Indians, dated December 19, 1891, referred to above, by which they agreed to cede to the Government the remainder of their lands west of the 96° of west longitude, known as the Cherokee Outlet, in consideration of moneys already paid and

the additional sum of $8,595,736, was ratified. Of which additional consideration the sum of $295,736 was made immediately available, and upon the payment of the same the lands in question were immediately to become a part of the public domain. The balance of the additional consideration, $8,300,000, was made payable in five equal installments, commencing on March 4, 1895, and ending March 4, 1899, deferred payments to bear interest at 4 per cent. The section of the act then makes the following provision:

> That of the money hereby appropriated a sufficient amount to pay the Delawares and Shawnees their pro rata share in the proceeds of said Outlet shall remain in the Treasury of the United States until the status of said Delaware and Shawnee Indians shall be determined by the courts of the United States before which their suits are now pending; and a sufficient amount shall also be retained in the Treasury to pay the freedmen who are citizens of the Cherokee Nation or their legal heirs and representatives such sums as may be determined by the courts of the United States to be due them.

The Delaware Indians, through their principal chief, Charles Journeycake, afterwards filed a motion to reopen the decree in the Delaware case in order to cause it to extend, first, to the proceeds derived from the sale of the Cherokee Outlet; second, to increase the proportion of the *per capita* payments which would come to the Delawares in the distri-

bution of the funds derived from the sale of the Cherokee Outlet. The court consented to the first proposition, but refused to increase the rate of the *per capita* payments, and in overruling that part of the motion, said:

> A decree in equity, so long as the case remains open and within the jurisdiction of the court, may be extended to a subsequently accruing cause of action the right to which has been determined by the original decision; but this extension of the decree must be strictly according to the decision. No new issue either of law or fact can be determined upon a motion of this kind.
>
> Where the complainants rest content with a decree in their favor, and it having been appealed comes back affirmed, the court can not make a new decision affecting the legal rights of the parties and increasing the amount of the recovery.
>
> Where the original decree fixed the proportionate share of the complainants in a certain fund, they can not introduce evidence to show that they were entitled to a larger proportion. Such a change is not the correction of an arithmetical mistake or clerical error, but a change of the basis upon which the recovery rests. (30 C. Cls., 172 to 179.)

Section 25 of the act of June 28, 1898 (30 Stat., 490), gave the court jurisdiction to hear and adjudicate a suit brought by the Delawares "for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation

under their contract and agreement with the Cherokee Nation, dated April eighth, eighteen hundred and sixty-seven."

Under this act the Delawares brought a suit, which was decided by this court on February 2, 1903 (38 C. Cls., 234), and by the Supreme Court on appeal on February 23, 1904 (193 U. S., 127), and it was held by both courts that the registered Delawares were "entitled to participate equally with Cherokee citizens of Cherokee blood in the allotments of lands" and that the jurisdiction of act and suit were necessary to accomplish that purpose.

The Cherokee freedmen, through their trustee, Moses Whitmire, brought suit in this court against the Cherokee Nation (30 C. Cls., 138) for their proportionate share of the proceeds derived from the sale of Cherokee lands west of the ninety-sixth degree of west longitude, known as the "Cherokee Outlet," and the court on March 4, 1895, held that under the treaty of July 19, 1866, and the Cherokee constitution of the same year, they were equally interested as a class with other citizens of the Cherokee Nation in the common property and its proceeds when distributed *per capita*. The court, however, refused to enter a decree "that the freedmen are entitled to participate with all the other members of the nation in all of the remaining common property upon equal terms with the other members of the nation," upon the ground that there might be trust estates among the common property of the nation for the benefit of designated individuals or

communities over which "the Cherokee government has no legitimate control," and in which "the freedmen have no interest." The court said that when it was informed of the number of freedmen entitled to participate in the various funds which *had been distributed* by act of the Cherokee national council to "Cherokees by blood," it would fix the amount of the judgment and enter a final decree for *its* distribution among those entitled. The court then stated that it would entertain suggestions of counsel as to how the requisite information should be obtained, and that in the meantime until further order of the court the entry of judgment would be suspended.

In the preparation of the decree to be entered in pursuance of the opinion of the court of March 4, 1895, the counsel of the parties litigant were unable to reach any agreement; the claimant insisted on recovering at the same rate *per capita* which the Cherokee Nation had adopted when distributing the funds among the "Cherokees by blood;" the defendants insisted that the court should adopt the number of freedmen, 2,052, which entered into the calculations of proportionate numbers in the Delaware and Shawnee cases. The court, however, on March 18, 1895 (30 C. Cls., 180), adopted the "corrected Wallace roll" of 3,524 freedmen as the basis for computation, after its further correction and approval by the Secretary of the Interior, of the amount due the freedmen of the moneys distributed to the Cherokees by blood, and fixed the amount

for distribution at $903,365, or $256.34 *per capita*, less the fees of counsel, expenses of making the roll and distribution of the fund, etc.

The court said, at page 188:

> This is not an action to recover damages in the nature of a suit at law, nor is it a proceeding in equity to wind up and dispose of the affairs and assets of a partnership. It is simply a suit in equity, brought by the equitable owners of a specific fund to recover their proportionate share in the same. The jurisdictional act recognizes this principle, for it authorizes suits to be brought for the proportionate shares of the parties in funds derived from the sales or leasing of lands of the Cherokee Nation. The court can not go beyond this if it would, and no court of equity will award to a party more than he is legally and equitably entitled to, because a party having a right to share in the fund is not within the jurisdiction of the court.

The court then ordered a decree to be entered following the form of the decree last entered in the Delaware case, and that the Wallace roll should "be further corrected by adding thereto descendants born since March 3, 1883, and prior to May 3, 1894, and striking therefrom the names of those who have died or have ceased to be citizens of the Cherokee Nation, so that when thus amended and changed it shall represent the freedmen entitled to participate in the distribution of the fund now awarded to the complainant."

The court authorized the Secretary of the Interior "to appoint a commissioner to proceed to the Cherokee country and ascertain and report to the Secretary the facts necessary for the correction of the roll above described." The court then directed that the expenses of the commissioner should be paid out of the fund awarded by the decree, and that "when a new and corrected roll is thus made and approved by the Secretary of the Interior he will cause the amount remaining of the fund awarded the complainants under this decree (after deducting the costs hereinafter directed to be paid by the complainants) to be paid and distributed to the freedmen entitled thereto, the cost of such distribution likewise being a charge upon this fund, pursuant to the act 2d March, 1895, section 11."

On May 8, 1895, a decree was entered in accordance with the opinion of the court in which the acts of April 26, 1886, November 25, 1890, and May 3, 1894, of the Cherokee National Council, providing for the payment of funds derived from the sale of public domain to Cherokees by blood, to the exclusion of Delawares, Shawnees, and freedmen, were declared invalid; the "corrected Wallace roll" was adopted as the basis for a roll to be made and approved by the Secretary of the Interior, and the Secretary of the Interior was directed to distribute the judgment of $903,365, or $256.34 *per capita*, after deducting attorney's fees, expenses, etc., among the freedmen whose names should be found upon the roll made and approved by him, and that any balance

left after such payments should be paid over to the Cherokee Nation by the Secretary of the Interior.

After the entry of the decree of May 8, 1895, the attorneys for the Delawares, Shawnees, and freedmen filed motions in their respective cases asking the court to reopen the decree and increase their *per capita* to $295.35, the amount distributed *per capita* by the Cherokee government to Cherokees by blood; and in the case of the freedmen the motion also asked the court to appoint commissioners to reascertain the number of freedmen. All of the motions were considered at the same time (31 C. Cls., 140–147). In the case of the freedmen the Cherokee national council had passed an act in which it had accorded to them the amount *per capita*, $295.35, asked for in the motion. The court, however, on January 27, 1896, overruled the motion as follows:

> In the case of *Whitmire, trustee*, v. *The Cherokee Nation*, the application of the claimant to reopen the decree and for the appointment of commissioners to reascertain the number of the freedmen and for judgment for $1,300,000 is overruled.

The court in its opinion said that it could not allow a larger award to the freedmen than contemplated by the jurisdictional act of October 1, 1890 (26 Stat., 636), simply because the Cherokee Nation had consented to the increase. In other words, that "consent does not confer jurisdiction" (p. 144). That the court fixed their rights under the treaty to their distributive shares in the fund referred to, and

"when the court awards those distributive shares its authority ends" (pp. 144 and 145). That while the court has made its award to the Delawares, Shawnees, and freedmen as a class, their identity must be determined by the Secretary of the Interior.

> The question of identity of individuals entitled to the benefits of a treaty, being in its nature political and within the Secretary's official jurisdiction, the court would adopt his determination if the complainants were to be named individually in the decree. By placing the funds in his hands for distribution and prescribing the principles under which they are to be distributed and the class of persons who are entitled to participate in the distribution, and leaving to the Secretary only the responsibility of ascertaining and determining who those individuals are, the court reaches the desired end more quickly and more conveniently than by setting forth in each decree the names of the complainants who are entitled to recover (pp. 143 and 144).

After the disposition of the motions by the court the counsel for the freedmen and the Cherokee Nation withdrew their respective applications for appeal to the Supreme Court and agreed to the substitution of a new decree in the place of the one entered by the court. Accordingly, on February 3, 1896, the decree of May 8, 1895, was vacated and set aside and a new decree entered as the final decree of the court in the case.

The decree of February 3, 1896 (Appendix A), contained practically the same provisions for the

distribution of the judgment of $903,365 as the decree which it superseded, except that it provided for the making of a new roll of freedmen. As in the previous decree it declared the acts of the Cherokee national council of April 26, 1886, November 25, 1890, and May 3, 1894, by which funds derived from the sale of the public domain were distributed among Cherokees by blood to the exclusion of adopted citizens and their descendants, to be void and contrary to and in derogation of the constitution of the Cherokee Nation and article 9 of the treaty of July 19, 1866, "with respect to the rights of said freedmen, who have been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and who on the said date resided therein, or who returned thereto within six months thereafter, and their descendants; and that the said Cherokee Nation or its trustees, the United States, account for, render, and pay to the aforesaid freedmen and free colored persons and their descendants, out of any funds of the said nation in its national treasury, or in the custody of the United States as trustee, or held by agreement between said nation and the United States for the purpose of satisfying the decree herein rendered, not specifically appropriated by law to other purposes, or out of funds which may hereafter come to the possession of said trustee belonging to the Cherokee Nation, a sum equal to the aggregate amount which said freedmen and free colored per-

sons and their descendants would have received if the above-mentioned void and unconstitutional restrictions in said statutes had not existed."

The decree next provided that the Cherokee freedmen, free colored persons, and their descendants living and in being on the 3d day of May, 1894, were entitled to participate thereafter "in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter, it being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree."

The decree next provided for the distribution of the judgment of $903,365 to the freedmen, after the deduction of attorneys' fees and other expenses incident to the suit and distribution of the funds, "such payments to be made upon a roll of said freedmen and free colored persons and their descendants as prepared and approved by the Secretary of the Interior in accordance with provisions hereinafter set forth in this decree."

The decree then authorized the Secretary of the Interior to appoint three commissioners—one on the nomination of the complainant, and one on the nomination of the defendant, the Cherokee Nation, both to be approved by him, and one on his own nomination—"to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants claiming to be entitled to share in the distribution of said $903,365 that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere; and that the said commissioners in ascertaining the identity of the freedmen entitled to share under this decree shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880 for the purpose of showing the

number of freedmen then entitled to citizenship in the said nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said commissioners shall ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll."

The decree then provides that when the roll made by the said commissioners shall have been approved by the Secretary of the Interior that he will cause the judgment of $903,365, after deducting costs and expenses, to be paid and distributed to persons entitled, such payments, however, not to exceed $256.34 per capita.

The decree then in great detail directs how and to whom counsel fees, costs, and expenses of the suit and distribution of the fund shall be paid, "and that any balance of the amount hereby decreed to said plaintiffs, and not consumed in the per capita payment herein provided for, shall be paid over to the Cherokee Nation as other moneys provided for in the agreement between said nation and the Secretary of the Interior hereinbefore referred to."

The decree then ordered that the Cherokee Nation, the defendant, should pay the costs of the suit as above provided, "and that if this judgment and decree be not carried out and satisfied within six months from the date hereof the claimant may apply to this

court for such further order, relief, or remedy as the plaintiff herein may deem necessary, and that if any further proceeding be had under this decree the rights of the attorneys and counsel for the plaintiff herein to further costs and allowances be reserved to be hereafter determined and fixed by the court, and the court reserves the right to make all such further orders in aid hereof as to it may seem meet."

Soon after the entry of the decree the counsel for the respective parties submitted to the court a draft of instructions for the guidance of the commissioners appointed under the decree of the court (Appendix B). The court declined to consider the instructions in the following indorsement:

> Respectfully referred to the Secretary of the Interior. The instructions to be given to the commissioners must be determined by him. The within, proposed by counsel, seem unobjectionable to the court, except the second. But with the approval of the Secretary the court will appoint the commissioners selected by him commissioners of this court to take testimony, which will authorize them to administer oaths.
>
> WILLIAM A. RICHARDSON.
>
> FEBRUARY 15, 1896.

The second paragraph to which the court referred as objectionable reads as follows:

> Second. It shall have the same power to administer oaths to witnesses, to compel the attendance of the same, to compel the production of written testimony, and to determine

> the admissibility of all evidence offered as the Court of Claims would have in making the investigation prescribed for said commission.

On February 18, 1896, the court gave its opinion, at the request of the Commissioner of Indian Affairs, upon the legal construction of the fifth of the proposed instructions referred to the Secretary of the Interior on February 15, 1896. The proposed instruction reads as follows:

> Fifth. In making the investigation prescribed in said decree it shall confine itself to the identity of the following classes of persons only: (1) All persons who had been held in bondage by any member of the Cherokee Nation and who had been liberated by act of law or by voluntary act of their owners, and the descendants of such; (2) all free colored persons who were in the Indian Territory at the commencement of the rebellion and were residents thereof at the time of the treaty of July 9, 1866, or who returned thereto within six months after the conclusion and ratification of said treaty, and their descendants; (3) all of the aforesaid classes who were citizens of the Cherokee Nation on May 3, 1894.

The court in its opinion said:

> The decree in this case follows and refers to Article IX of the treaty with the Cherokee Nation, July 19, 1866, and the persons therein designated are the complainants in this case entitled to payment under the decree.
>
> The court is of the opinion that the clauses in that article in these words, "*and are now*

residents therein, or who may return within six months, and their descendants," were intended for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

The court is also of the opinion that this period of six months extends from the date of the *promulgation of the treaty*, August 11, 1866, and consequently did not expire until February 11, 1867.

(31 C. Cls., 140.)

On February 20, 1896, the Commissioner of Indian Affairs prepared a draft of instructions for the commissioners appointed by the Secretary of the Interior, which was approved by him on that date, and afterwards, on April 21, 1896, formally approved in a communication to the Commissioner of Indian Affairs. The instructions directed that in ascertaining the identity of the freedmen the commissioners should accept the roll of 1880 and make no inquiry respecting it other than to ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and that no evidence should be accepted tending to disprove the citizenship of any of the persons whose names appeared on that roll. The Secretary, how-

ever, stated that no such roll as the authenticated Cherokee roll of 1880 was on file in the Interior Department, but that when Mr. Wallace was making up the roll of freedmen, in 1889, who were living on March 3, 1883, he was furnished with a copy of the roll of 1880 containing the names of 1,874 freedmen.

The commissioners were directed to enroll only such persons as were alive and in being May 3, 1894, and were at that time residents of the Cherokee Nation, "it being understood that the freedmen and their descendants and free colored persons above referred to include only such persons of said classes as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of said decree (February 3, 1896)."

The commissioners were finally directed that upon the completion of their labors they should "submit a schedule of the names of the persons determined by you as being entitled to share in the distribution of the fund of $903,365 mentioned in the aforesaid decree, with a typewritten report of your daily proceedings and of all evidence where claimant is not admitted by a vote of the majority of said commission, and file stenographic notes of all testimony taken."

In the letter of the Secretary approving the instructions he says that it is the duty of the commission "to ascertain and determine who are the individual freedmen and free colored persons of the Cherokee Nation now entitled to share in the dis-

tribution of the sum awarded by said decree of the Court of Claims, filed February 3, 1896."

While the roll was in process of preparation by the commissioners appointed by the Secretary of the Interior the attorney for the freedmen filed, on April 14, 1896, a motion asking the court to instruct the commissioners to enroll the names of all those freedmen who had been liberated by the voluntary act of their owners or by law, and their descendants, as provided by the treaty of July 19, 1866, "and if it shall appear to said commission that any person or persons of the aforesaid class had been taken from the Cherokee Nation during the rebellion either by the owners thereof or was absent therefrom during said time because of his or their belonging to either of the armies that were engaged in the late rebellion, and were unable to return to the Cherokee Nation within six months after the conclusion and ratification of the treaty referred to in the decree in said cause, of date July 16, 1866, because of circumstances beyond their control, but returned as soon as practicable, then no such person shall be excluded by said commission from the roll to be prepared by it, but the same shall be placed thereon, as well as the descendants of such."

After full consideration of the question presented by the attorney for the freedmen, the court entered the following order (Appendix E):

> The court is of the opinion that the act 2d March, 1895 (28 Stat. L., p. 910, sec. 11), prescribes the manner in which payments per

capita shall be made and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.

The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs, February 18, 1896.

The within motion for instructions is overruled.

April 15, 1896.

By the court:

WM. A. RICHARDSON,
Chief Justice.

Mr. Kern, who filed the motion as attorney for the freedmen, was also a member of the commission which made the "Kern-Clifton roll." The roll was completed in December, 1896, and payment begun in February of 1897, under the decree of February 3, 1896, and all of their proportion of the funds derived from the sale of the Cherokee Outlet have been distributed per capita to the freedmen whose names were found on that roll, the last payment having been made about twelve years ago.

On March 3, 1893 (27 Stat., 645), Congress created a commission to the Five Civilized Tribes, commonly known as the "Dawes Commission," for the purpose of procuring the extinguishment of the national or tribal title to the lands held by the tribes living in the Indian Territory, and their cession to the United States for allotment in severalty among the members thereof.

By the act of June 10, 1896 (29 Stat., 321), Congress directed the Dawes Commission to make a roll of the Five Civilized Tribes, and at the same time ratified the tribal rolls as they then existed, so that the duty of the commission was limited to passing upon the qualifications of applicants for enrollment. The act further provides that:

> The said commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs.

The act of June 7, 1897 (30 Stat., 83), provided:

> That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, *shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of*

> *such nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act.* And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided also,* That anyone whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

On June 28, 1898 (30 Stat., 495), Congress passed what is known as the "Curtis Act," by section 21 of which the Dawes Commission was directed to make a roll of Cherokee citizens as follows:

> SECTION 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of the Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found

thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

* * * * *

After a number of other provisions the act provides in the same section that—

> The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

The act of June 28, 1898, passed the House of Representatives as H. R. No. 8581 on April 14, 1898, with a provision in section 22 (which on its final

passage became section 21), directed to the Dawes Commission:

> It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims, rendered the third day of February, eighteen hundred and ninety-six.

The Congressional Record shows that House bill No. 8581 (the Curtis bill) was read twice in the Senate on April 16, 1898, referred to the Senate Committee on Indian Affairs, and reported back to the Senate on May 23, 1898, with the following proposed amendment to section 22 of the bill, which was debated at considerable length:

> The roll of the freedmen of the Cherokee Nation made under the provisions of the decree entered of record in the Court of Claims of the United States, February third, eighteen hundred and ninety-six, in the case of Moses Whitmire, trustee of the freedmen of the Cherokee Nation, against the Cherokee Nation and the United States, is hereby confirmed, and the Commission to the Five Civilized Tribes shall make a roll of said freedmen by adopting the aforesaid roll as made in the aforesaid case.
>
> And it shall add thereto the names of the descendants of all persons thereon born since May third, eighteen hundred and ninety-four, and the names of all persons who applied before the commission that made the roll of freedmen in said case, and whose names were not placed upon either said roll or the rejected roll of freedmen made by said commission in said case, if in their judgment the evidence

> offered before said commission to the Five Civilized Tribes justified their being made citizens of the Cherokee Nation in accordance with the provisions of said decree, and the descendants of said persons born since May third, eighteen hundred and ninety-four; and from the roll thus made the said commission shall expunge the names of all persons on said roll who have died since May third, eighteen hundred and ninety-four, or who shall have abjured their citizenship in the Cherokee Nation; and the roll as thus made shall be the final and complete roll of the freedmen of the Cherokee Nation.

On June 7, 1898, the Curtis bill (H. R. No. 8581) again came up for discussion in the Senate, and after further debate was passed with Senate amendments. The above amendment, to confirm the "Kern-Clifton roll," however, was rejected and stricken out. The provision for making the Cherokee freedman roll was passed in the identical language in which it had passed the House, and in which it finally became a law in the Curtis Act of June 28, 1898. (Congressional Record, vol. 31, part 6, pp. 5582, 5583.)

The instructions of the Secretary of the Interior of November 23, 1899, to the Commission to the Five Civilized Tribes for their guidance in making out the roll of freedmen followed literally the language of the decree of February 3, 1896, and directed them to take the roll of 1880 as the only roll to be used in identifying applicants for enrollment under the act of June 28, 1898, and that the names of such appli-

cants must either be found upon that roll or testimony furnished to trace their ancestry to some freedman whose name should be found upon it.

On May 14, 1900, the departmental instructions of November 23, 1899, were revoked and new instructions issued to the Dawes Commission. After discussing the Whitmire case in connection with the provision in the act of June 28, 1898, for making out the roll of Cherokee freedmen "in strict compliance with the decree of the Court of Claims, rendered the third day of February, eighteen hundred and ninety-six," the Secretary said:

> A roll was made under this decree, known as the "Clifton roll," which was approved by this department in 1897. It has been claimed that said roll contains many names not properly belonging there, but whether this fact influenced Congress to disregard that roll and direct that a new one be made in strict compliance with said decree is immaterial, for the fact remains that the decree alone is to be taken as a guide for making the roll which your commission is to prepare.
>
> The roll of 1880, made by the Cherokee Nation, is to be accepted by you as conclusive of the right of all persons whose names are found thereon and of their descendants to be enrolled by you. Your only duty in relation thereto is to ascertain who of the persons named therein are alive and who of their descendants are alive and place their names on your roll, omitting, however, all who have forfeited or abjured their citizenship.

In the former decree the Wallace roll, after being corrected by adding the names of descendants and striking off the names of those who had died or ceased to be citizens, was to be taken as the correct roll of all freedmen, free colored persons, and their descendants entitled to citizenship. The same explicit direction was not given in the modified decree as to the roll of 1880. By the former decree the Secretary of the Interior was authorized to appoint a commissioner to ascertain and report the facts necessary for the correction of the Wallace roll, but in the modified decree he was, for the purpose of ascertaining and determining who are the individual freedmen, authorized to appoint three commissioners "to proceed to the Cherokee country and hear testimony both for and against the identity of all freedmen, free colored persons, and their descendants claiming to be entitled to share in the distribution of said $903,365." This commission was not restricted to ascertaining the facts necessary to complete and bring up to date the roll of 1880, but in addition to that duty were also to hear testimony both for and against the identity of all freedmen, free colored persons, and their descendants claiming citizenship in the Cherokee Nation, but no evidence was to be accepted tending to disprove the citizenship of any person whose name appears upon the roll of 1880. Evidently something more than the completion and correction of the roll of 1880 was intended. It was intended that a full and complete roll should be made that should include the names

> of all freedmen, free colored persons, and their descendants entitled to be recognized as citizens of the Cherokee Nation. It is your duty now to make such a roll, which shall include the names of all Cherokee citizens "who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty or who returned thereto within six months thereafter, and their descendants."
>
> The instructions of November 23, 1899, upon this subject are hereby revoked.
>
> (Annual Report of Department of Interior for 1902, pt. 2, p. 125.)

After the issuance of the instructions of May 14, 1900, Thomas M. Buffington, at that time principal chief of the Cherokee Nation, and three other citizens of the Cherokee Nation filed a petition in the United States District Court at Muskogee for an injunction to restrain the Dawes Commission from enrolling the names of any Cherokee freedman whose name could not be found on the roll of 1880, or who could not trace their ancestry to some freedman whose name could be found upon that roll. The allegation was made "that in proceeding to make such roll they [the Dawes Commission] are receiving, considering, and making a record of intermarried freedmen and other persons who do not appear upon any roll of citizens of said nation, or upon the authenticated

roll of 1880, or in compliance with the decree of the Court of Claims and the act of May 31, 1900." The District Court took jurisdiction of the case in an interlocutory opinion filed in open court October 26, 1901, in which a temporary injunction was granted until the Cherokee Nation should intervene and the questions involved in the petition be considered upon their merits. (Annual Report of Department of Interior for 1902, Part 2, pp. 121 to 123.)

The act of May 31, 1900 (31 Stat., 221), referred to in the interlocutory opinion of the court, provided:

> That said commission shall continue to exercise all authority heretofore conferred on it by law; but it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior.

The injunction was dissolved on August 25, 1903, in a very exhaustive opinion by Judge Raymond, and the bill dismissed for want of equity. The court said that it was the duty of the Dawes Commission in making a roll of the freedmen "in strict compliance with the decree of the Court of Claims, rendered the third day of February, eighteen hundred and ninety-six," to construe the decree of the Court of Claims, and the learned judge reached the conclusion that the "common property of the Cherokee Nation is

now about to be divided. It would seem that this commission appointed by the Secretary of the Interior was for the purpose only of fixing a basis for the payment of the $903,365, and not as a basis for division of the public lands of the nation." (Annual Report of Interior Department for 1904, part 2, pp. 138–161.)

The district court in dissolving the injunction took the ground that the duties of the Secretary of the Interior in making and approving the roll of freedmen "in strict compliance with the decree of the Court of Claims" were judicial in their character and not subject to review by the courts. In this he followed the opinion of Judge Sanborn in *Kimberlin* v. *Commission to the Five Civilized Tribes*, decided October 15, 1900 (104 Fed. R., 653), where the court in construing the act of June 28, 1898, the act under consideration in this case, said, speaking of the powers delegated to the Dawes Commission:

> Nevertheless, in the determination of the citizenship of the parties who apply to them for membership in the Five Nations, they are vested with judicial powers by the acts of Congress.

Further on the court said:

> Under these acts of Congress the Commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refusal to enroll the applicant in each particular case

> constitutes its judgment in that cause. In the case before us this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the judicial discretion of the commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved. Under the settled rules to which attention was called in the opening of this opinion, no court has jurisdiction by the use of the writ of mandamus to substitute its own opinion for that of the tribunal to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors, or to reverse its decision. The judgments of the courts below were right, and they are affirmed (pp. 662, 663).

The Supreme Court, in the case of the *Laurel Oil and Gas Company* v. *Robert W. Morrison et al.* (212 U. S., 291), decided February 23, 1909, said:

> Section 12 of the act of March 3, 1905 (33 Stat., 1081, c. 1479), in force when the proceedings in the present case were had, provides:
>
> "That hereafter all appeals and writs of error shall be taken from the United States courts in the Indian Territory to the United States Court of Appeals in the Indian Territory, and from the United States Court of Appeals in the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit, in the same manner as is now provided for in

> cases taken by appeal or writ of error from the Circuit Courts of the United States to the Circuit Court of Appeals of the United States for the Eighth Circuit."
>
> We find no statute giving an appeal from that Circuit Court of Appeals to this court, and perceive no reason for concluding that Congress intended that parties in such cases should be entitled to three appeals.
>
> Appeal dismissed.

On March 22, 1909, in another case from the Eighth Circuit, *Sass and Crawford* v. *Minnie Thomas and Charley Thomas* (214 U. S., 489), the Supreme Court dismissed the appeal upon the authority of the Laurel Oil and Gas Company case without comment.

On November 16, 1907, the State of Oklahoma, composed of the Indian Territory and the Territory of Oklahoma, was admitted into the Union.

On July 1, 1902 (32 Stat., 716), Congress passed another act entitled, "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," commonly known as the "Cherokee agreement," which provided that a roll of the Cherokee Nation should be made as follows:

> SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said commission shall, from time to time and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the

> Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

Section 2 of the act of April 26, 1906 (34 Stat., 137), in part provides:

> That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

And section 3 of said act in part provides:

> The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall

> not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.

On January 18, 1906, House bill No. 5976, Fifty-ninth Congress, first session, entitled "A bill to provide for the final disposition of the affairs of the Five Civilized Tribes of the Indian Territory, and for other purposes," which afterwards became the act of April 26, 1906 (34 Stat., 137), came up for debate in the House of Representatives, and after considerable discussion, an amendment was offered to section 3 by Mr. Campbell, of Kansas, for the purpose of allowing the enrollment of freedmen who had not returned to the Cherokee Nation within six months from the promulgation of the treaty of July 19, 1866, as provided by the 9th article, which amendment reads as follows:

> *Provided*, That the roll of Cherokee freedmen shall include the names of all such persons as are mentioned in article nine of the Cherokee treaty of July nineteenth, eighteen hundred and sixty-six, who made application for such enrollment on or prior to December first, nineteen hundred and five, who were taken from the nation or driven therefrom under circumstances which were beyond their control, and who did not, subsequent to August eleventh, eighteen hundred and sixty-six, make application for citizenship in any other tribe.

This amendment, however, was rejected and the bill became a law in the identical language of section 3 quoted above. (Congressional Record, vol. 40, part 2, pp. 1240, 1248, and 1249.)

The Cherokee roll was completed and approved by the Secretary of the Interior as provided by the act of April 26, 1906, *supra*, on March 4, 1907.

On October 2, 1909, the following report was received from the Department of the Interior:

> Referring to the letter (G. M. A.) of September 30, 1909, from Assistant Attorney-General John Q. Thompson, in regard to the enrollment of Cherokee freedmen, you are advised that the records of the Department of the Interior show that upon the final roll of the Cherokee freedmen prepared by the commission, or the Commissioner to the Five Civilized Tribes, and approved by the Department under the acts of Congress of June 28, 1898 (30 Stat. L., 495) and July 1, 1902 (32 Stat. L., 716), there are enrolled 174 freedmen whose names are also on the Cherokee roll of 1880, but who are not identified on the Kern-Clifton roll.

On September 30, 1907, the attorney for the freedmen in the original Whitmire case, No. 17209, R. H. Kern, together with two additional attorneys, Messrs. Putman & Poe, filed a motion to be allowed to file a supplemental petition for the purpose of opening up the decree rendered February 3, 1896, and procuring from the court the issuance of some kind of an order, upon the ground that Congress had used language in

the acts of June 28, 1898, and July 1, 1902, in dealing with the allotment of Cherokee lands east of the ninety-sixth degree of west longitude, which might by inference be supposed to confer jurisdiction upon the court to issue such order under a decree dealing with the proceeds of common lands west of the ninety-sixth degree of west longitude, and because, as they say, the Dawes Commission, under the act of July 1, 1902, "has made a roll of freedmen, including persons not on the court's roll and excluding persons on the court's roll, and even persons on the roll of 1880, as made by the Cherokee Nation itself."

The court, of its own motion, upon the filing of the claimants' motion and supporting brief, without waiting for the defendants' brief, remanded the case to the law calendar for oral argument for the reasons stated in a memorandum attached thereto, which reads as follows: "Has not the act under which the suit of Whitmire was originally brought peformed its office? Is it not too late now to bring the suit contemplated by the supplemental petition?"

On April 20, 1908, over one year after the Cherokee final rolls had been completed and approved by the Secretary of the Interior, an order was passed by the court allowing the appointment of a substitute trustee and the filing of the claimant's supplemental petition. The petition contains the following prayer for relief:

> The premises considered, your petitioner prays that this honorable court will pass a decree declaring the action of the said Dawes

Commission and the Secretary of the Interior whereby the names of said freedmen were excluded from the roll and citizenship of the Cherokee Nation be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustee for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said nation, and further enjoining the said defendant, and particularly the United States acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said homes and improvements, and further enjoining upon the said defendant, the United States acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements.

ARGUMENT.

The purpose for which this suit was instituted.

The primary object of the institution of this suit was to determine the right of the Cherokee freedmen to participate in the per capita distribution of the proceeds derived from the sale of lands west of the ninety-sixth degree of west longitude, and incidentally the right of such freedmen to participate in the per capita distribution of any funds derived from the sale of the Cherokee public domain. Since the removal of the Cherokee Indians from their old homes in the east to

the Indian Territory, and their settlement upon the lands comprising the public domain of the Cherokee Nation, up to the present time no lands have been sold by the Cherokee Nation east of the ninety-sixth degree of west longitude. At various times, however, lands were ceded to the United States west of the ninety-sixth degree of west longitude, until finally the nation parted with all of its lands west of the ninety-sixth degree of west longitude in the sale of the *Cherokee Outlet*. By the act of March 2, 1889, *supra*, Congress authorized the President to appoint a commission to negotiate for the cession of the Cherokee Outlet.

Congress in the jurisdictional act of October 1, 1890, *supra*, authorized this court to determine the right of the Delawares, Shawnees, and freedmen to participate in the *per capita* distribution of the proceeds derived from the sale, leasing, or rent of the lands west of the ninety-sixth degree of west longitude; and while the adjudication of this question necessarily involved the determination of the right of the Delawares, Shawnees, and freedmen to participate in the distribution of the funds derived from the sale of the common property of the tribe, the jurisdictional act did not authorize a judgment or decree for that purpose. Paragraph 6 of article 2 of the Tahlequah agreement of December 19, 1891, *supra*, for the cession of the Cherokee Outlet, distinctly recognizes the fact that suits had been authorized to determine the beneficiaries of the proceeds of the cession.

Congress also recognized the fact that the suits of the Delawares, Shawnees, and freedmen were brought for their pro rata shares of the proceeds of the Cherokee Outlet. The act of March 2, 1893, appropriating the compensation for the cession of the Cherokee Outlet, provided that a sufficient amount to pay the Delawares, Shawnees, and freedmen their pro rata share of the proceeds of the Cherokee Outlet should remain in the Treasury until their status should be determined by the courts.

The object of this suit was also clearly recognized by this court in its opinion delivered on March 4, 1895 (30 C. Cls., 138). The court then held that, as a general proposition, under the treaty of July 19, 1866, *supra*, and the Cherokee constitution of the same year, the freedmen were equally interested as a class with other citizens of the Cherokee Nation in the common property, and its proceeds *when distributed per capita*, but refused, however, to enter a decree "that the freedmen are entitled to participate with all the other members of the nation in all of the remaining common property upon equal terms with the other members of the nation," upon the ground that there might exist among the common property of the nation trust estates for the benefit of designated individuals or communities over which "the Cherokee government has no legitimate control," and in which "the freedmen have no interest." The court said that when it was informed of the number of freedmen entitled to participate in the various funds which had been distributed by act of the Cherokee national

council exclusively to "Cherokees by blood," *it would fix the amount of the judgment and enter a final decree for its distribution among those entitled.*

The court in its second opinion in this case delivered on March 18, 1895 (30 C. Cls., 180), fixed the amount of its judgment in favor of the Cherokee freedmen at $903,365, or $256.34 *per capita*, less counsel fees, expenses for making the roll, and distribution of the fund, etc. Before entering the decree for the distribution of the judgment the court said:

> This is not an action to recover damages in the nature of a suit at law, *nor is it a proceeding in equity to wind up and dispose of the affairs and assets of a partnership. It is simply a suit in equity, brought by the equitable owners of a specific fund to recover their proportionate share in the same.* The jurisdictional act recognizes this principle, for it authorizes suits to be brought for the proportionate shares of the parties in funds derived from the sale or leasing of lands of the Cherokee Nation. *The court can not go beyond this if it would,* and no court of equity will award to a party more than he is legally and equitably entitled to, because a party having a right to share in the fund is not within the jurisdiction of the court (p. 188).

The jurisdictional act of October 1, 1890, did not authorize or contemplate the institution of suits in this court for the determination of the rights of Delawares, Shawnees, and freedmen *to allotments in the tribal lands east* of the ninety-sixth degree of west longitude. This construction of the jurisdictional act was fully

recognized by Congress in section 25 of the Curtis Act of June 28, 1898 (30 Stat., 490), when it gave this court jurisdiction to hear and adjudicate a suit brought by the Delawares "for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation, under their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven." Under this act the Delawares brought a suit which was decided by the court on February 2, 1903 (38 C. Cls., 234), and affirmed by the Supreme Court on appeal February 23, 1904 (193 U. S., 127), in which it was held by both courts that the registered Delawares were "entitled to participate equally with Cherokee citizens of Cherokee blood in the allotments of lands," and that the jurisdictional act and the suit instituted thereunder were necessary for the accomplishment of that purpose.

The rights of the Delawares, Shawnees, and freedmen to institute suits under the jurisdictional act of October 1, 1890, were coextensive and identical, and if it was necessary for the Delawares to secure a jurisdictional act to entitle them to have their status in regard to the lands east of the 96th degree of west longitude determined, it was equally necessary for the freedmen.

The purpose for which the decree of February 3, 1896, was entered.

The sole purpose for which the decree of May 8, 1895, and the subsequent decree of February 3, 1896, were entered by the court was for the distribution of

the judgment of $903,365 entered in favor of the Cherokee freedmen.

The decree of May 8, 1895, entered in accordance with the opinion of March 18, 1895, provided that the "corrected Wallace roll" should be adopted as the basis for a roll to be made and approved by the Secretary of the Interior, and the Secretary of the Interior was directed to distribute the judgment, after deducting attorneys' fees, expenses, etc., among the Cherokee freedmen whose names should be found upon such roll, and the balance left, after the designated payments, was directed to be paid over to the Cherokee Nation by the Secretary.

After the entry of the decree of May 8, 1895, the attorneys for the Delawares, Shawnees, and freedmen filed motions in their respective cases asking the court to reopen the decree and increase their *per capita* to $295.35, the amount distributed *per capita* by the Cherokee government to Cherokees by blood. In the case of the freedmen the motion also requested the court to appoint commissioners to reascertain the number of freedmen entitled to participate in the distribution of the judgment. All of the motions were considered by the court at the same time. In the case of the freedmen the Cherokee national council had passed an act giving them the amount *per capita* requested in the motion. The court, however, on January 27, 1896, overruled the motion as follows (31 C. Cls., 140–147):

> In the case of *Whitemire, trustee,* v. *The Cherokee Nation,* the application of the claim-

> ant to reopen the decree and for the appointment of commissioners to reascertain the number of the freedmen and for judgment for $1,300,000 is overruled.

The court in its opinion said that it could not allow a larger award to the freedmen than was contemplated by the jurisdictional act of October 1, 1890 (26 Stat., 636), simply because the Cherokee Nation had consented to the increase. In other words, "consent does not confer jurisdiction" (p. 144). The court in the same opinion, fixed their rights under the treaty, to their distributive shares in the fund referred to, and said that "when the court awards those distributive shares its authority ends." That while the court has made its award to the Delawares, Shawnees, and freedmen *as a class, their identity* must be determined by the Secretary of the Interior.

> The question of identity of individuals entitled to the benefits of a treaty, being in its nature political and within the Secretary's official jurisdiction, the court would adopt his determination if the complainants were to be named individually in the decree. By placing the funds in his hands for distribution and prescribing the principles under which they are to be distributed and the class of persons who are entitled to participate in the distribution, and leaving to the Secretary only the responsibility of ascertaining and determining who those individuals are, the court reaches the desired end more quickly and more con-

> veniently than by setting forth in each decree the names of the complainants who are entitled to recover (pp. 143 and 144).

The Cherokee Nation was dissatisfied with both the amount of the judgment and the "Wallace roll" under which it was ordered to be paid. It was, however, more dissatisfied with the "Wallace roll" than with the judgment, and it was agreed between the counsel for both parties that the judgment should stand, the applications for appeals be withdrawn, and a new decree entered, ordering a new roll to be prepared, and the judgment to be paid, *per capita*, to the freedmen found upon such court roll. The court accordingly, on February 3, 1896, entered a new decree in which it directed that the judgment of $903,365 should be distributed *per capita* among the freedmen who should be found upon a roll made by three commissioners appointed by the Secretary of the Interior, and afterwards approved by him.

The decree of February 3, 1896 (Appendix A), provided for the making of a new roll, otherwise it contained practically the same provisions for the distribution of the judgment of $903,365 as the decree it superseded. As in the previous decree, the acts of the Cherokee National Council of April 26, 1886, November 25, 1890, and May 3, 1894, appropriating funds derived from the sale of the public domain among Cherokees by blood exclusively, were declared to be void and contrary to and in derogation of the constitution of the Cherokee Nation and article 9 of the treaty of July 19, 1866, *supra*, "with re-

spect to the rights of said freedmen, who have been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and who on said date resided therein, or who returned thereto within six months thereafter, and their descendants." The decree then provided the manner in which the judgment shall be paid out of funds of the Cherokee Nation in the hands of the United States, "a sum equal to the aggregate amount which said freedmen and free colored persons and their descendants would have received if the above-mentioned void and unconstitutional restrictions in said statutes had not existed."

The decree then provided that the Cherokee freedmen, free colored persons and their descendants, living and in being on the 3d day of May, 1894, were entitled to participate thereafter "in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that *in the distribution* of the proceeds and avails of the public domain or common property of the nation among the citizens thereof *by distribution per capita* at any time hereafter the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act

of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter. It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree."

The decree then provided for the distribution of the judgment of $903,365 to the freedmen, after deducting attorneys' fees and other expenses incident to the suit, "such payments to be made upon a roll of said freedmen and free colored persons and their descendents as prepared and approved by the Secretary of the Interior in accordance with the provisions hereinafter set forth in this decree."

The decree authorized the Secretary of the Interior to appoint three commissioners, one on the nomination of the complainant, and one on the nomination of the defendant, the Cherokee Nation, both to be approved by him, and one on his own nomination, "to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons and their descendants, *claiming to be entitled to share in the distribution of said $903,365*, that may be offered by the respective parties to this suit; and that each of said parties shall be

entitled to be represented before said commissioners either at the taking of testimony in the Cherokee country or elsewhere."

The decree then substitutes the Cherokee roll of 1880 for the corrected Wallace roll as a basis for making the new roll. The language of the decree would appear to indicate that the court intended that only those freedmen and free colored persons whose names should be found on the roll of 1880, or their descendants, should be placed upon the roll prepared by the Secretary of the Interior for the distribution of the judgment. The decree on this point reads as follows:

> Said commissioners in ascertaining the identity of the freedmen entitled to share under this decree shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880, for the purpose of showing the number of freedmen then entitled to citizenship in the said nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said commissioners shall ascertain *who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll.*

The decree then provided that when the roll had been made and approved by the Secretary of the Interior he should cause the judgment of $903,365, after deducting costs and expenses, to be distributed to the citizens entitled, the payments not to exceed $256.34 *per capita*.

The decree then in great detail directs how and to whom counsel fees, costs, and expenses of the suit and distribution of the judgment shall be paid. It provides that any balance left over, and not consumed in the *per capita* payments, shall be paid over to the Cherokee Nation.

The decree then directed that the Cherokee Nation should pay the costs of the suit, "and that if this judgment and decree be not carried out and satisfied within six months from the date hereof the claimant may apply to this court for such further order, relief, or remedy as the plaintiff herein may deem necessary."

The concluding language of this quotation from the decree has been eagerly seized upon by the attorneys for the petitioner in this case as showing that "the court reserves the right to make all such further orders in aid hereof as to it may seem meet," as though the words "in aid hereof" had been omitted and the language used had been intended as an independent sentence. What the court really meant by this language was, that if the judgment should not be satisfied within six months from the date of the decree, it would issue such further order as might be necessary in aid

of its distribution of the judgment as contemplated by the decree.

The opinion of the court and the language of the decree show conclusively that the only purpose the court had in view was the distribution of the judgment of $903,365, less counsel fees, costs, and expenses, among the Cherokee freedmen whose names should be found on the Cherokee roll of 1880, or who could trace their descent from some ancestor on that roll. The Secretary of the Interior was directed to prepare and approve the final roll, but he was limited to those freedmen on the roll of 1880 and their descendants.

The Secretary of the Interior was invested with exclusive jurisdiction to make the Kern-Clifton roll.

The court in its opinion, rendered on January 27, 1896, in overruling the motions of the Delawares, Shawnees, and freedmen to reopen the decree of May 8, 1895, said that while the court had made its award to the Delawares, Shawnees, and freedmen as a class, their identity must be determined by the Secretary of the Interior.

Soon after the entry of the decree of February 3, 1896, counsel for the respective parties submitted to the court a draft of instructions for the guidance of the commissioners appointed by the Secretary of the Interior under the decree of the court (Appendix B). The court declined to consider the proposed instructions in the following indorsement:

> Respectfully referred to the Secretary of the Interior. The instructions to be given to the

> commissioners must be determined by him. The within, proposed by counsel, seem unobjectionable to the court, except the second. But, with the approval of the Secretary, the court will appoint the commissioners selected by him commissioners of this court to take testimony, which will authorize them to administer oaths.
>
> WILLIAM A. RICHARDSON.
>
> FEBRUARY 15, 1896.

The second paragraph to which the court referred is as follows:

> Second. It shall have the same power to administer oaths to witnesses, to compel the attendance of the same, to compel the production of written testimony, and to determine the admissibility of all evidence offered as the Court of Claims would have in making the investigation prescribed for said commission.

The court refused to give any instructions to the commissioners, upon the ground that that matter rested entirely within the discretion of the Secretary of the Interior. It was noticed, however, that the second paragraph of the proposed instructions would have given to the commissioners appointed by the Secretary power and authority which could only be conferred by Congress, and the court suggested to the Secretary that this could be obviated by making the commissioners commissioners of the Court of Claims to take testimony. On February 18, 1896, at the request of the Commissioner of Indian Affairs, the

court gave its opinion (Appendix C; 31 C. Cls., 140) on the legal construction of the fifth of the proposed instructions referred to the Secretary of the Interior on February 15, 1896.

This instruction (Appendix B) was the construction placed upon article 9 of the treaty of July 19, 1866, by counsel of the parties. Thus it will be seen that the court still absolutely refused to give any instructions to the Secretary of the Interior as to the identity of the individuals who should be placed upon the Kern-Clifton roll.

On February 20, two days after the receipt of the opinion of the court, the Commissioner of Indian Affairs prepared a draft of instructions for the commissioners appointed by the Secretary of the Interior, which was approved by him on that date, and afterwards, on April 21, 1896, formally approved in a communication to the Commissioner of Indian Affairs. The instructions directed that in ascertaining the identity of the freedmen the commissioners should accept the roll of 1880, and make no inquiry respecting it other than to ascertain who of said persons named on said roll were alive, and what descendants of said persons were alive, on May 3, 1894, and that no evidence should be accepted tending to disprove the citizenship of any of the persons whose names appeared on that roll.

It may be stated, however, that the roll on file in the Interior Department of 1880 contained at the time it was furnished to Mr. Wallace in 1889 the

names of 1,874 freedmen. A number were, however, afterwards added to it, and when the roll of 1880 was used in making the first distribution to the Delawares and Shawnees *per capita*, as their proportion of the moneys paid to the Cherokees by blood exclusively, there were 2,052 on the roll.

The commissioners were directed to enroll only such persons as were alive and in being on May 3, 1894 (the date of the last Cherokee exclusion act), and were at that time residents of the Cherokee Nation, "it being understood that the freedmen and their descendants and free colored persons above referred to include only such persons of said classes as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of said decree (February 3, 1896)."

The commissioners were finally directed upon the completion of their labors to submit a schedule of the names of persons determined by them "as being entitled to share in the distribution of the fund of $903,365 mentioned in the aforesaid decree," together with a typewritten report of the daily proceedings and all evidence where a claimant was not admitted by vote of the majority of the commission. They were directed to file a report of all stenographic notes taken. The directions, so far as the filing of the stenographic notes of all the testimony taken was concerned, do not appear to have been followed.

In the letter of the Secretary approving the instructions he says it was the duty of the commission

"to ascertain and determine who are the individual freedmen and free colored persons of the Cherokee Nation now entitled to share in the distribution of the sum awarded by said decree of the Court of Claims, filed February 3, 1896."

On April 15, 1896, the Court of Claims decided the identical question involved in this controversy, and it came before them for consideration in the following manner: On April 14, 1896, a motion was filed in the case by the attorney for the freedmen requesting the court to instruct the commissioners to enroll the names of all those freedmen who had been liberated by voluntary act of their former owners or by law, and their descendants, as provided by the treaty of July 19, 1866, "and if it shall appear to said commission that any person or persons of the aforesaid class had been taken from the Cherokee Nation during the rebellion either by the owners thereof, or was absent therefrom during said time because of his or their belonging to either of the armies that were engaged in the late rebellion, and were unable to return to the Cherokee Nation within six months after the conclusion and ratification of the treaty referred to in the decree in said cause of date July 19, 1866, because of circumstances beyond their control, but returned as soon as practicable, then no such person shall be excluded by said commission from the roll to be prepared by it, but the same shall be placed thereon, as well as the descendants of such." (Appendix E.)

The court on these instructions indorsed the following opinion, which is also found of record in the last opinion of the court in this case (31 C. Cls., 140):

> The court is of the opinion that the act 2d March, 1895 (28 Stat. L., p. 910, sec. 11), prescribes the manner in which payments per capita shall be made and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.
>
> The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs, February 18, 1896.
>
> The within motion for instructions is overruled. April 15, 1896.
>
> By the court:
>
> WM. A. RICHARDSON,
> *Chief Justice.*

The Kern-Clifton roll was completed in December, 1896, and payment was begun in February, 1897, under the decree of February 3, 1896, and all of their proportion, derived from the sale of the Cherokee Outlet, has been distributed *per capita*, the last payment having been made about twelve years ago; and the decree so far as the purposes of this suit are concerned has performed its office. Of course it may be used as a guide in making other rolls, but so far as this court is concerned its vitality has been exhausted. Those freedmen who have been excluded from the Kern-Clifton roll by the opinion of the court of February 18, 1896, and

whose claim the court again on March 15, 1896, refused to consider, were for the most part placed upon the roll by order of the Secretary of the Interior after the matter had been referred to him. It is clear therefore that the Secretary of the Interior did not confine himself to the Cherokee roll of 1880, as directed by the decree of February 3, 1896, and this was the reason Congress in the act of June 28, 1898, *supra*, directed the Dawes Commission to "make a roll of Cherokee freedmen *in strict compliance* with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six," and afterwards reenacted the same in the act of July 1, 1902, *supra*.

The Dawes Commission in making out the new roll at first considered only the applications of freedmen whose names were found on the roll of 1880, or their descendants, but on May 14, 1900, the instructions of November 23, 1899, were revoked and new instructions were issued to the commission, in which it was said that something more than the completion and correction of the roll of 1880 was intended by the decree of the court; that a full and complete roll should be made, that should include the names of all freedmen, free colored persons and their descendants entitled to be recognized as citizens of the Cherokee Nation; that it should include the names of all Cherokee citizens "who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all

free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty or who returned thereto within six months thereafter, and their descendants."

In consequence of the change of instructions by the Interior Department, the principal chief of the Cherokee Nation, Thomas M. Buffington, and three other citizens of the Cherokee Nation filed a petition in the United States District Court at Muskogee for an injunction restraining the Dawes Commission from enrolling any freedman whose name could not be found on the roll of 1880, or who could not trace his ancestry to some freedman whose name should appear on said roll. The allegation was made "that in proceeding to make such roll they [the Dawes Commission] are receiving, considering, and making a record of intermarried freedmen and other persons who do not appear upon any roll of citizens of said nation, or upon the authenticated roll of 1880, or in compliance with the decree of the Court of Claims and the act of May 31, 1900."

A temporary injunction was granted, for the reasons set out in the opinion filed in open court on October 26, 1901, until the Cherokee Nation should intervene and the questions involved in the petition considered upon their merits. (Annual Report Department of the Interior, 1902, pt. 2, pp. 121–123.)

The complaint of the petitioners in the supplemental petition recently filed in this case by consent

of the court is practically the same complaint made by Buffington et al. in their suit in the United States District Court—that the Dawes Commission under the act of July 1, 1907, "has made a roll of freedmen, including persons not on the court's roll and excluding persons on the court's roll, and even persons on the roll of 1880, as made by the Cherokee Nation itself."

The United States District Court in the opinion in the Buffington case considered not only the language used in the act of June 28, 1898, directing the roll to be made "in strict compliance with the decree of the Court of Claims, rendered the third day of February, eighteen hundred and ninety-six," but also the act of May 31, 1900 (31 Stat., 221).

On August 25, 1903, Judge Raymond dissolved the temporary injunction in the Buffington case and dismissed the bill for want of equity. The court said that it was the duty of the Dawes Commission in making a roll of freedmen "in strict compliance with the decree of the Court of Claims, rendered the third day of February, eighteen hundred and ninety-six," to construe that decree. The court said also that as the tribal property was about to be divided "it would seem that this commission appointed by the Secretary of the Interior was for the purpose only of fixing a basis for the payment of the $903,365, and not as a basis for division of the public lands of the nation."

In dissolving the injunction the court took the ground, upon the authority of the case of *Kimberlin* v. *Commission to the Five Civilized Tribes* (104 Fed.

R., 653), that the duties of the Secretary of the Interior in making and approving the roll of freedmen "in strict compliance with the decree of the Court of Claims" were judicial in their character and not subject to review by the courts. (Annual Report Interior Department, 1904, pt. 2, pp. 138–161.)

Judge Sanborn in the *Kimberlin case*, *supra*, said that the Dawes Commission in passing upon the claims of citizenship in the Cherokee Nation was vested with judicial powers by acts of Congress; that the commission was a special tribunal vested with judicial power to hear and determine the claims of applicants, and that its enrollment or refusal to enroll in any particular case constituted its judgment; that whether its decision was right or wrong was immaterial in any other court, and that the question would not be considered; that no court had jurisdiction by the use of mandamus to substitute its own opinion for that of a tribunal to which the law had intrusted the decision of the questions, or to control the judicial discretion of that tribunal, correct its errors, or reverse its decision.

The opinion of Judge Sanborn was rendered on October 15, 1900, in construing the Curtis Act of June 28, 1898, and previous acts of Congress. The Curtis Act is the one which is really under discussion by this court.

The Supreme Court in the case of the *Laurel Oil and Gas Company* v. *Morrison et al.* (212 U. S., 291), decided February 23, 1909, and afterwards followed in the case of *Sass* v. *Thomas* (214 U. S., 489), dismissed the appeals from the Eighth United States

Circuit upon the ground that that court was the court of last resort for cases from United States courts of the Indian Territory. This case arose, like the case at bar, prior to the admission of Oklahoma into the Union on November 16, 1907.

Congress in passing section 27 of the act of July 1, 1902 (32 Stat., 716), passed it with the construction placed upon section 21 of the act of June 28, 1898, by Judge Sanborn in his opinion in the Kimberlin case. This we may presume upon the authority of the case of *Sessions* v. *Romadka* (145 U. S., 41, 42), where the Supreme Court said:

> This was practically the construction given to corresponding sections of the act of 1837 by this court in *Smith* v. *Nichols* (21 Wall., 112) and, in the Revised Statutes, in *Dunbar* v. *Myers* (94 U. S., 187, 193). * * * Congress, having in the Revised Statutes adopted the language used in the act of 1837, must be considered to have adopted also the construction given by this court to this sentence and made it a part of the enactment.

The same principle was afterwards laid down by the Supreme Court in *Claflin* v. *Commonwealth Insurance Company* (110 U. S., 81) and in *The Abbotsford* (98 U. S., 440).

The construction of Judge Sanborn must necessarily have been known to Congress because the opinions in both the Buffington and Kimberlin cases were set out in full in the annual reports of the Secretary of the Interior to Congress.

For the same reasons the construction placed by the Interior Department on section 21 of the act of June 28, 1898, may be presumed to have influenced Congress in passing legislation subsequent to that act. See *Brown* v. *United States* (113 U. S., 568), where the question involved the construction of a statute as to whether "any officer of the navy" included warrant officers or only commissioned officers.

Thus in summing up under this heading it may be said that the court in holding on April 15, 1896, that the Secretary of the Interior had exclusive jurisdiction of the making of the Kern-Clifton roll under the decree of February 3, 1896, definitely settled that question, even though the decision might have been erroneous, for as this court held in the case of *Osborn* v. *United States* (9 C. Cls., 153), that even though decided upon principles of law which were afterwards in other cases held by the Supreme Court to be erroneous, the decision was *res judicata* between the same parties in another suit upon the same questions of law; and in the case of *Adams* v. *United States* (36 C. Cls., 104) it was held that—

> A judgment rendered by this court under its general jurisdiction, which stands unvacated and unreversed, is a final judgment, though founded upon an erroneous ruling of law.

In addition to the decision of this court upon the question of the exclusive jurisdiction of the Secretary of the Interior, we have the same identical questions

now involved in this suit decided by the United States Court at Muskogee and the Circuit Court of Appeals at St. Louis.

Congress refused to confirm the Kern-Clifton roll.

The Dawes Commission was created by the act of March 3, 1893 (27 Stat., 645), for the purpose of procuring the extinguishment of the tribal title to the lands held by the Five Civilized Tribes within the limits of the Indian Territory, and their cession to the United States for allotment in severalty among the individual members.

On June 10, 1896, Congress directed the Dawes Commission to make a roll of the Five Civilized Tribes, and at the same time ratified the tribal rolls as they then existed, and provided that from the decisions of the Dawes Commission applicants for enrollment should have the right of appeal to the United States courts of the Indian Territory. The act also provided that—

> The said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs.

By the act of June 7, 1897 (30 Stat., 83), the powers of the Dawes Commission were considerably enlarged and the tribal rolls were again confirmed with great particularity.

Prior to the passage of the act of June 28, 1898, as well as after its passage, it was well known that the Kern-Clifton roll had not been made "*in strict com-*

pliance with the decree of the Court of Claims." The Secretary of the Interior, in his instructions of May 14, 1900, to the Dawes Commission, refers to the fact that "it has been claimed that said roll contains many names not properly belonging there, but whether this fact influenced Congress to disregard that roll and direct that a new one be made in strict compliance with said decree is immaterial, for the fact remains that the decree alone is to be taken as a guide for making the roll which your commission is to prepare." (Annual Report Interior Department, 1902, pt. 2, p. 125.)

In a report from the Interior Department dated October 2, 1909, filed in this case (*ante*, p. ——), the statement is made that the final roll of the Cherokee freedmen prepared by the commission, or the Commissioner to the Five Civilized Tribes, approved by the department under the acts of June 28, 1898, and July 1, 1902, *supra*, shows that there are enrolled 174 freedmen whose names are also on the Cherokee roll of 1880, but who do not appear on the Kern-Clifton roll.

The fact that the Kern-Clifton roll was erroneously made is also clearly shown by the action of Congress while the bill, which afterwards became the Curtis Act, was under discussion in the Senate after its passage by the House. Mr. Pettigrew offered an amendment on May 23, 1898, confirming the Kern-Clifton roll in express terms, which was defeated on June 7, 1898, and the provision sought to be amended remained as it had passed the House and as it now

stands. (Congressional Record, vol. 31, pt. 6, pp. 5582, 5583.)

There was considerable debate upon the amendment at the time it was introduced and at the time it was defeated, and it is very apparent that the cause of its defeat was its want of accuracy.

This also is the construction placed by Congress upon the meaning to be attached to section 27 of the act of July 1, 1902, as well as section 21 of the act of June 28, 1898, and was a distinct repudiation of the Kern-Clifton roll.

In addition to this, Congress knew exactly what construction had been placed upon both of the above acts by the Dawes Commission, because its construction was reported to Congress in the annual reports of the Secretary of the Interior referred to. Nevertheless Congress by section 2 of the act of April 26, 1906 (34 Stat., 137), provided "that the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the *Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.*"

The persons who are now claiming the right to enrollment upon an "injunction of this court" belong to that class who did not return within six months from the promulgation of the treaty of July 19, 1866, and who claim that they were unable to get back. This was the same class that the court refused to consider when on April 15, 1896, it was held that the

Secretary of the Interior had exclusive jurisdiction of the making of the Kern-Clifton roll, and referred the proposed instructions of the attorney for the freedmen to him, who, notwithstanding the plain language of the decree that only freedmen whose names appeared on the roll of 1880, or their descendants, should be considered, issued the instructions of May 14, 1900, above referred to, which directed the Dawes Commission to take up the right of citizenship *de novo*, and as a consequence many of these claimants were placed on the final roll of the Cherokee Nation. The Buffington case was a protest against this action by the commission, and after that case had been dismissed for want of jurisdiction, the attorney for the Cherokee Nation came to Washington and had section 3 of the act of April 26, 1906, *supra*, passed, in order to prevent the Dawes Commission from enrolling any more freedmen of the objectionable class. The section provides that—

> The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven.

While the act of April 26, 1906, *supra*, was up for discussion on January 18, 1906, in the House of Rep-

resentatives, an amendment to section 3 was offered by Mr. Campbell, of Kansas, for the purpose of allowing the enrollment of freedmen who had not returned to the Cherokee Nation within six months from the promulgation of the treaty of July 19, 1866, as provided by the ninth article thereof, which reads as follows:

> *Provided*, That the roll of Cherokee freedmen shall include the names of all such persons as are mentioned in article nine of the Cherokee treaty of July nineteenth, eighteen hundred and sixty-six, who made application for such enrollment on or prior to December first, nineteen hundred and five, who were taken from the nation or driven therefrom under circumstances which were beyond their control, and who did not, subsequent to August eleventh, eighteen hundred and sixty-six [the date of the promulgation of the treaty], make application for citizenship in any other tribe.

This amendment was rejected and the bill was passed in the identical language of the section quoted above. (Congressional Record, vol. 40, pt. 2, pp. 1240, 1248, 1249.)

The Cherokee roll was completed and approved by the Secretary of the Interior as provided by the act of April 26, 1906, *supra*, on March 4, 1907.

Thus it will appear that Congress not only refused to accept the Kern-Clifton roll, but placed the mark of its disapproval upon the action of the Kern-Clifton Commission and the Dawes Commission in enrolling freedmen who had not returned within six months

from the promulgation of the treaty of July 19, 1866; and in addition to this we would call the attention of the court to the fact that the Supreme Court fully recognized in the *Cherokee Intermarriage cases* (203 U. S., 92) the fact that Congress had not approved any roll of the Cherokee Nation except that of 1880. The court there said:

> The roll of 1880, made by the Cherokees, was a census roll, and its confirmation was not intended to create any rights which citizens of the Cherokee Nation had not before enjoyed, but merely to furnish the basis for making up the roll of citizens. Section 21 was in reality a statement that no previous act of Congress was intended to confirm any other roll of the Cherokee Nation

The action of the Secretary of the Interior in making up and approving the final rolls of the Cherokee Nation is res judicata.

The acts of Congress delegated authority to the Dawes Commission to prepare the final rolls of the Five Civilized Tribes, and the provisions of the act of June 28, 1898, *supra*, and the Cherokee agreement of 1902, to the effect that the rolls "thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe upon which allotments of land and distribution of other tribal property shall be made," created in the Secretary of the Interior a tribunal of exclusive jurisdiction, whose judgments upon the question of citizenship are *res judicata*. The rule has been well stated by the

Supreme Court in the case of the *United States* v. *California & Oregon Land Company* (148 U. S., 31), as follows:

> Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of *United States* v. *Arredondo* (31 U. S., 6 Pet., 691, 729; 8 L. ed., 547), this court said: "It is an universal principle that, where a power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for or other provision, by some appellate or supervisory tribunal, is prescribed by law."
>
> The judgment of a special tribunal is final and conclusive *when no provision is made for appeal to any other jurisdiction.* (Land tribunal.) (*Foley* v. *Harrison*, 15 How., 433, 446; 14 L. ed., 761.)

It will be observed by the court that there is no right of appeal granted from the action of the Secre-

tary of the Interior in citizenship cases, and as the Supreme Court said in *Harvey* v. *Tyler* (2 Wall., 328–342):

> Where special powers conferred on a court of general jurisdiction are to be exercised in usual form of common law and chancery proceedings the presumptions as to conclusion of judgment are the same as attach to cases within its general power.

And as the Supreme Court said in the case of *Lumber Company* v. *Butchel* (101 U. S., 638, 639):

> Judgment based on referee's finding is conclusive as to the facts found in subsequent controversies between same parties on same contract.

In the case of *Steele* v. *Smelting Company* (106 U. S., 447–451) the Supreme Court reviewed a large number of authorities and reached the conclusion that "the decision of a competent special tribunal is conclusive."

In the case of *Adams Express Company* v. *Ohio State Auditor* (165 U. S., 194, 229) the same court said:

> Findings of fact by a special tribunal can not be overturned except by evidence establishing fraud.

The Supreme Court in the case of *Keim* v. *The United States* (33 C. Cls., 174; affirmed by the Supreme Court, 177 U. S., 290) said:

> The Court of Claims will not review the decision of the head of one of the executive departments in matters committed to his discretion.

And this court in the case of *Plummer* v. *The United States* (24 C. Cls., 517) said:

> Where a statute intrusts a public officer with a designated duty the exercise of his discretion in performing that duty can not be reviewed if he acts within the general scope of his authority under the statute.

And it may be said in passing that there is no question in this case that the Secretary exceeded his authority in his disallowance of this claim.

This court also said in the case of *Day* v. *The United States* (21 C. Cls., 262):

> The doctrine of *res judicata* applies to the decisions of the executive departments.

If this be true as to matters committed generally to the discretion of the executive departments, it should be proportionately of greater force as to matters specifically committed by act of Congress.

The constitutionality of the act of June 28, 1898, was considered at great length and sustained by the Supreme Court in the case of *Stephens* v. *The Cherokee Nation* (174 U. S., 445), and the question of citizenship was also extensively reviewed, as well as the power of Congress to reopen the consideration of citizenship cases.

In the case of *Wallace* v. *Adams* (204 U. S., 415) the Supreme Court held that Congress had full power over the question of citizenship in Indian tribes, and that "it may adopt any reasonable method to ascertain who are citizens, and if one method is unsatisfactory it can try another; nor is its power exhausted because

the first plan is by inquiry in a territorial court. The functions of a territorial court in such a case are those of a commission rather than a court." The court also held that the investigation of the question of citizenship is necessarily judicial in its character.

In the case of *West* v. *Hitchcock* (205 U. S., 80) it was held that "in the absence of any indication in the act to allow an appeal to the courts for applicants who are dissatisfied, mandamus will not issue to require the Secretary to approve the selection of one claiming to be an adopted member of the tribe but whose application the Secretary has denied." The court also held that "where the Secretary of the Interior has authority to pass on the right of one claiming to be a member of a band of Indians to select land under an agreement ratified by an act of Congress, his jurisdiction does not depend upon his decision being right."

The petitioner's prayer for relief.

Congress provided that the final rolls of the Cherokee Nation should be made up of those living on March 4, 1906, and further provided that the rolls should be finally closed on March 4, 1907, after which the Secretary of the Interior should have no authority to place any new names on the roll. On April 20, 1908, over one year after the final rolls had been completed and approved by the Secretary of the Interior, an order was passed by this court allowing the appointment of a substitute trustee and the filing of claimant's supplemental petition.

The petition contains the following remarkable prayer for relief, which for the convenience of the court we will divide into sections:

> 1. The premises considered, your petitioner prays that this honorable court will pass a decree declaring the action of the said Dawes Commission and the Secretary of the Interior whereby the names of said freedmen were excluded from the roll and citizenship of the Cherokee Nation be declared to be unlawful.
>
> 2. Further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustee for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said nation.
>
> 3. Further enjoining the said defendant, and particularly the United States acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said homes and improvements.
>
> 4. Further enjoining upon the said defendant, the United States acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements.

We have already called the attention of the court to the fact that the final roll of the Cherokee Nation had been completed and approved, and nothing more was necessary to be done, for over a year before the

petition was allowed to be filed in this case. It is very rarely, indeed, that the writ of injunction is used for the enforcement of affirmative action; its ordinary function is to restrain the threatened action of some officer of the Government, or private company, or individual.

In *Ex parte Joins* (191 U. S., 93–102), the court refused to issue the writ of prohibition against the Citizenship Court of the Choctaw Nation, a special tribunal, upon the ground that the case had already been decided. The court said:

> This being so, there is nothing which this court could prohibit, even if it were of opinion that the petitioner made out a good case on the merits, which we do not intimate. Therefore the writ must be denied.

The case of *Fleming et al.* v. *McCurtain et al.* (215 U. S., ——), involving the same questions as the Joins case, came up on direct appeal to the Supreme Court and was decided on November 8, 1909, upon its merits. In that case the court was asked to reopen the Choctaw rolls upon the ground that the citizenship court had been bribed by the attorneys for the Choctaw Nation. The Supreme Court, however, went to the very root of the matter and held that under the patent to the Choctaw Nation the individual members of the tribe acquired no such vested interest in the tribal lands as would entitle them to maintain an action to reopen the rolls which had been finally approved by the Secretary of the Interior. A comparison of the language used in the Choctaw

and Cherokee patents discloses a title much nearer to a fee simple in the Choctaw Nation than in the Cherokee Nation. So that the rule laid down by the Supreme Court as applicable to the Choctaw rolls is much stronger when applied to the Cherokee rolls.

The case of *Pam-To-Pee* v. *The United States* (187 U. S., 371), greatly relied upon by the petitioners, is in reality strongly against their contention in this case. In that case the rolls had been closed and the judgment distributed, just as in this case. It afterwards appeared that there was a class of Indians who had been left out, but who were entitled to participate in the judgment. The court held that "where the circumstances are as in the case at bar any further relief must be obtained from Congress and can not be given by the courts."

In the case of *Garfield* v. *Goldsby* (211 U. S., 249), cited in the *Fleming case, supra,* the Supreme Court held that "after the Secretary of the Interior has approved a list containing the name of a person found by the Dawes Commission to be entitled to enrollment for distribution, he can not, without giving that person notice and opportunity to be heard, strike his name from the list. It would not be due process of law."

CONCLUSION.

The judgment of the court in this case rests upon two propositions, one of fact and one of law, both of which we have shown to be absolutely erroneous: First, that the Kern-Clifton roll had been confirmed by Congress; second, that the duties of the Dawes

Commission in making up the final roll of the Cherokee Nation were merely ministerial.

We have shown, on the contrary, that the Kern-Clifton roll was repudiated and discredited by Congress and the Interior Department, and that the duties of the Secretary of the Interior in approving the Kern-Clifton roll, as well as the final roll of the Cherokee Nation prepared by the Dawes Commission, were judicial in their character and not subject to review by courts of law.

We therefore respectfully ask the court to refuse to reopen the decree of February 3, 1896, and to dismiss the supplemental petition in this case.

GEO. M. ANDERSON,
Attorney for the United States.

APPENDIX A.

DECREE OF FEBRUARY 3, 1896.

Court of Claims.

MOSES WHITMIRE, TRUSTEE FOR THE Freedmen of the Cherokee Nation, *v.* THE CHEROKEE NATION AND THE United States. } No. 17209.

It appearing that since the entry of the decree filed May 8, 1895, the defendant, the Cherokee Nation, has filed motions for a rehearing and new trial and an application for an appeal from said decree to the Supreme Court, which motions have not been heard and which application for an appeal has not yet been allowed; and it appearing that both parties are desirous of avoiding further litigation and have agreed that if the court shall see fit to modify said decree, it will be accepted as final.

Now, on motion by the attorney for the complainant, the defendant consenting thereto, it is ordered that the said decree be vacated and set aside and that the following decree be entered as to the final decree in this case.

Court of Claims.

MOSES WHITMIRE, TRUSTEE FOR THE Freedmen of the Cherokee Nation, *v.* THE CHEROKEE NATION AND THE United States. } No. 17209.

At a sitting of the Court of Claims in the city of Washington, this 3d day of February, 1896.

This cause coming on to be heard upon the amended petition, answer, agreed facts, proofs, and arguments submitted by the parties respectively, and the court having heard the same and considered the just rights in law and equity of the freedmen of the Cherokee Nation, including all persons who had been liberated by voluntary act of their owners, or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and resided therein July 19, 1866, or returned thereto within six months thereafter, and their descendants who are settled and incorporated into the Cherokee Nation, in pursuance of the authority vested in the court by act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawneee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," approved October 1, 1890.

And it appearing to the court that under the provisions of article 9 of the treaty of July 19, 1866, made by and between the Cherokee Nation and the United States, the said freedmen, who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood.

It further appearing to the court that under and by virtue of an act entitled "An act making appropria-

tions for current and contingent expenses, and for fulfilling treaty stipulations with Indian tribes, for the fiscal year ending June 30, 1894,'' approved March 3, 1893, it was provided for the payment to the Cherokee Nation of the sum of $8,595,736, the same to be in full consideration of all the right, title, interest, and claim which said nation might have in the lands lying west of 96 degrees west longitude, commonly known as the Cherokee Outlet, and it further appearing that of the said sum of $8,595,736 the sum of $295,736 was appropriated by said act out of the Treasury of the United States and made immediately available, and that the balance thereof, to wit, $8,300,000, was made payable in five annual installments, the first to be payable on the 4th of March, 1895, and all deferred payments to bear interest at the rate of 4 per cent per annum; and that a sufficient amount of the money provided in said act should be paid for the purchase of said Cherokee Outlet to pay the Delawares and Shawnees their pro rata share of said outlet and which should remain in the Treasury of the United States until the status of said Delaware and Shawnee Indians should be determined by the courts of the United States before which their suits were then pending; also a sufficient amount to pay the freedmen who are Cherokee citizens, as the same shall be determined by the courts; and the said act further providing that if the legislative council of the Cherokee Nation should deem it more advantageous to their people they might issue a loan for the principal and interest of the deferred payments, pledging said amounts of interest and principal to secure payment of such debt; and it appearing to the court that said Cherokee Nation has borrowed from the Union Trust Company of New York the sum of $6,640,000 and pledged as security

therefor the four payments as aforesaid, falling due after the 4th day of March, 1895, and that the payment falling due on the said 4th of March, 1895, amounting to $1,660,000, has been retained in the Treasury of the United States from which to pay the Delawares, Shawnees, and freedmen, as hereinbefore set forth; and it further appearing to the court that the said $6,640,000, so borrowed by the Cherokee Nation, has been distributed to the Cherokee citizens of Cherokee blood, to the exclusion of the complainants, the aforesaid freedmen and free colored persons and their descendants, as well as the two funds of $300,000 each distributed by the act of the Cherokee council of date April 26, 1886, and November 25, 1890, as charged in the amended petition in this case.

It is ordered, adjudged, and decreed that so much of the acts of the Cherokee national council of date April 26, 1886, November 25, 1890, and May 3, 1894, as restricts the distribution of funds which were derived from the public domain and from the sale of lands by the Cherokee Nation to the Government of the United States, to citizens of the nation by blood, be held and decreed void and contrary to and in derogation of the constitution of the Cherokee Nation and the provisions and stipulations of article 9 of the aforesaid treaty of July 19, 1866, with respect to the rights of said freedmen, who have been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and who on the said date resided therein, or who returned thereto within six months thereafter, and their descendants; and that the said Cherokee Nation or its trustees, the United States, account for, render, and pay to the aforesaid freedmen and free

colored persons and their descendants, out of any funds of the said nation in its national treasury, or in the custody of the United States as trustee, or held by agreement between said nation and the United States for the purpose of satisfying the decree herein rendered, not specifically appropriated by law to other purposes, or out of funds which may hereafter come to the possession of said trustee belonging to the Cherokee Nation, a sum equal to the aggregate amount which said freedmen and free colored persons and their descendants would have received if the before-mentioned void and unconstitutional restrictions in said statutes had not existed.

And it is further adjudged and decreed that the complainants in this suit and those whom they represent, being the freedmen and free colored persons aforesaid and their descendants living and in being on the 3d day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who

returned thereto within six months thereafter and their descendants, to the prejudice of the latter.

It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree.

And it is further adjudged and decreed with respect to the participation of said freedmen and free colored persons aforesaid and their descendants in the three funds referred to in the three statutes of the Cherokee Nation hereinbefore declared to be void and unconstitutional, that the Cherokees by blood having received a sum which amounts at the date hereof to $7,240,000, in which the said freedmen and free colored persons aforesaid and their descendants were entitled to have and participate in the distribution of said sum; and for the purpose of fixing an amount thereof which ought to be distributed among said freedmen and free colored persons and their descendants, it is further adjudged and decreed that said freedmen and free colored persons and their descendants are entitled to have and receive the sum of $903,365 out of the sum last aforesaid, after deducting the amounts hereinafter allowed and decreed to be paid to the trustee herein as his compensation for services as trustee and the attorney of record of the complainant herein, and the other expenses incident to the ascertainment and payment of the complainants, the freedmen, as hereinafter provided, such balance remaining to be paid by the Secretary of the Interior to the freedmen and free colored persons aforesaid and their descendants, per capita, who would have been entitled to receive the same if the unconstitutional restrictions and discriminations

in said statutes had not existed. Such payments to be made upon a roll of said freedmen and free colored persons and their descendants as prepared and approved by the Secretary of the Interior in accordance with provisions hereinafter set forth in this decree.

And it is further ordered and adjudged that for the purpose of ascertaining and determining who are the individual freedmen of the Cherokee Nation now entitled to share in the distribution of the said sum of $903,365, the Secretary of the Interior be authorized to appoint three commissioners, one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons and their descendants, claiming to be entitled to share in the distribution of said $903,365, that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere; and that the said commissioners in ascertaining the identity of the freedmen entitled to share under this decree shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880, for the purpose of showing the number of freedmen then entitled to citizenship in the said nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said com-

missioners shall ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll.

And it is further ordered and directed that when the foregoing roll so reported by the said commissioners shall be approved by the Secretary of the Interior he will cause the amount remaining of the fund of $903,365, after deducting the costs and expenses herein directed to be paid by the complainants, to be paid and distributed to the persons entitled thereto, such payments, however, not to exceed $256.34 per capita, and the cost of such distribution and payment likewise being a charge upon the fund of the complainants so to be distributed pursuant to the act of March 2, 1895, section 11.

And it is further directed that the amount of $6,500, or so much thereof as may be necessary, is hereby allowed for the compensation of the said commissioners and the necessary costs and expenses incidental to the ascertainment of the individual complainants by them as hereinbefore provided; and it is hereby adjudged that one-half of such compensation and expenses shall be paid by the complainants and deducted from the recovery in this suit, and that the remaining one-half part of such compensation and expenses shall be paid by the defendant, the Cherokee Nation, in addition to the costs hereinafter adjudged against the said defendant. And the Secretary of the Interior is authorized to fix the compensation of said commissioners and to advance for the necessary and immediate expenses of making the rolls as hereinbefore provided such amount as he may deem advisable.

There is further adjudged and decreed to Robert H. Kern, the attorney of record for complainant, for compensation and counsel fees, including the compensation of all associate counsel and the expenses and disbursements incident to the litigation, 2 per cent of the amount of the recovery, to wit, $18,067.30, which amount it is adjudged shall be paid by the Secretary of the Treasury of the United States to the said Robert H. Kern out of the funds hereinbefore mentioned, now in his hands, and that the same when so paid shall be charged to the defendant, the Cherokee Nation.

And there is further decreed and adjudged to the said Robert H. Kern, attorney of record of the complainants, for compensation and counsel fees, including the compensation of all associate counsel and the expenses and disbursements incident to the litigation, 4 per cent upon the amount of the recovery, to wit, $36,134, which amount it is adjudged shall be paid by the Secretary of the Treasury of the United States out of the funds hereinbefore mentioned, now in his hands, and shall be a charge against the freedmen of the Cherokee Nation and paid out of the funds hereinbefore awarded to them.

It is further adjudged and decreed that Moses Whitmire, as trustee of the complainants, be allowed for compensation for his services as such, including expenses and disbursements made by him, the sum of $5,000, which amount it is adjudged shall be paid to said trustee by the Secretary of the Treasury of the United States out of the funds hereinbefore mentioned, now in his hands, and shall be a charge against the freedmen of the Cherokee Nation and paid out of the funds hereinbefore awarded to them.

And the complainant having represented that the number of the freedmen entitled to distribution is not less than 3,524, it is further ordered that if said number of persons entitled to distribution shall not equal that number the payments made shall not exceed $256.34 per capita, and that any balance of the amount hereby decreed to said plaintiffs, and not consumed in the per capita payment herein provided for, shall be paid over to the Cherokee Nation as other moneys provided for in the agreement between said nation and the Secretary of the Interior hereinbefore referred to.

It is further adjudged that the Secretary of the Interior pay the aforesaid amount decreed to be paid by him out of the aforesaid funds now in the Treasury Department of the United States.

And it is further ordered, adjudged, and decreed that the defendant, the Cherokee Nation, pay the costs of this suit, as above provided, and that if this judgment and decree be not carried out and satisfied within six months from the date hereof the claimant may apply to this court for such further order, relief, or remedy as the plaintiff herein may deem necessary, and that if any further proceeding be had under this decree, the rights of the attorneys and counsel for the plaintiff herein to further costs and allowances be reserved to be hereafter determined and fixed by the court, and the court reserves the right to make all such further orders in aid hereof as to it may seem meet.

It is hereby stipulated and agreed on the part of the complainant and on the part of the defendant, the Cherokee Nation, that the foregoing decree be entered in this case in the place and stead of the decree entered and filed May 8, 1895, in this case, and

that it be entered nunc pro tunc as of that date, to wit, May 8, 1895, and that the application for an appeal filed by the complainant and the application for an appeal and motions for a rehearing and for a new trial filed by the said defendant be mutually withdrawn upon the entry of this corrected decree.

Dated Washington, February 3, 1896.

ROBERT H. KERN,
Attorney for the Complainant.
E. C. BOUDINOT,
MAXWELL & CHASE,
Attorneys for the Cherokee Nation.
S. H. MAYES,
Principal Chief of the Cherokee Nation.

The defendants, the United States, offer no objection to the entry of the amended decree as provided in this stipulation.

———— ————,
Assistant Attorney-General.

APPENDIX B.

PROPOSED INSTRUCTIONS TO COMMISSION APPOINTED UNDER DECREE OF FEBRUARY 3, 1896, BY THE SECRETARY OF THE INTERIOR, SUBMITTED BY COUNSEL TO THE COURT AND ORDER OF COURT THEREON. (RECEIVED IN REPORT FROM INTERIOR DEPARTMENT NOVEMBER 21, 1907.)

The court doth adjudge and decree that the commission provided for in its decree entered of record in the Court of Claims on February 3, 1896, in the case of *Moses Whitmire, trustee, etc.*, v. *Cherokee Nation et al.*, being case No. 17209, shall be governed by the following rules and directions in the discharge of the duties prescribed for it in said decree, to wit:

First. Said commission before commencing its duties shall qualify by each member thereof taking an oath before any United States commissioner that he will faithfully perform the duties of his said office.

Second. It shall have the same power to administer oaths to witnesses, to compel the attendance of the same, to compel the production of written testimony, and to determine the admissibility of all evidence offered as the Court of Claims would have in making the investigation prescribed for said commission.

Third. It shall, as soon as practicable, proceed to the Cherokee Nation to hear such evidence as may be offered pro and con as to the identity of the freedmen entitled to share in the money mentioned in the decree; but before beginning its labors it shall give notice there by at least two weekly insertions in the two most widely circulated papers in the nation as to the times and places they will hear evidence on behalf

of the parties to this suit. And it shall, as far as practicable, appoint such places for the hearing of such testimony as shall be most convenient to the parties to this suit; and it shall also hear testimony at any place other than the Cherokee Nation that in its judgment may be necessary.

Fourth. It shall make no other inquiry as to the authenticated Cherokee roll mentioned in the decree than to ascertain who of the persons mentioned on said roll and their descendants were alive on May 3, 1894, and who were at said date citizens of the Cherokee Nation.

Fifth. In making the investigation prescribed in said decree it shall confine itself to the identity of the following classes of persons only: (1) All persons who had been held in bondage by any member of the Cherokee Nation and who had been liberated by act of law or by voluntary act of their owners and the descendants of such; (2) all free colored persons who were in the Indian Territory at the commencement of the rebellion and were residents thereof at the time of the treaty of July 9, 1866, or who returned thereto within six months after the conclusion and ratification of said treaty, and their descendants; (3) all of the aforesaid classes who were citizens of the Cherokee Nation on May 3, 1894.

Sixth. The commission is hereby authorized to employ a competent clerk.

Seventh. In determining the identity of the persons aforesaid a vote of a majority of said commission shall establish the identity of the person provided for in said decree, and when the commission shall have finished its labors it shall report to the Secretary of the Interior the names of the persons determined by it as being entitled to share in the

proceeds mentioned in the aforesaid decree, with evidence as to identity of freedmen where commission is not unanimous.

Eighth. The said commission shall conclude its labors within four months from the time it qualifies as aforesaid.

(Indorsement:) Respectfully referred to the Secretary of the Interior. The instructions to be given to the commissioners must be determined by him. The within, proposed by counsel, seem unobjectionable to the court, except the second. But with the approval of the Secretary the court will appoint the commissioners selected by him commissioners of this court to take testimony, which will authorize them to administer oaths.

WILLIAM A. RICHARDSON.

FEBRUARY 15, 1896.

APPENDIX C.

MOSES WHITMIRE, TRUSTEE,
v.
THE CHEROKEE NATION.
} FEBRUARY 18, 1896.

Hon. DANIEL M. BROWNING,
Commissioner of Indian Affairs.

SIR: The court is informed that the Commissioner of Indian Affairs desires its opinion in regard to the fifth of the proposed instructions referred for the consideration of the Secretary of the Interior February 15, 1896.

The decree in this case follows and refers to Article IX of the treaty with the Cherokee Nation, July 19, 1866, and the persons therein designated are the complainants in this case entitled to payment under the decree.

The court is of the opinion that the clauses in that article in these words, "*and are now residents therein, or who may return within six months, and their descendants,*" were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

The court is also of the opinion that this period of six months extends from the date of the *promulgation of the treaty*, August 11, 1866, and consequently did not expire until February 11, 1867.

WILLIAM A. RICHARDSON,
Chief Justice.

(31 C. Cls., 147, 148.)

APPENDIX D.

INSTRUCTIONS BY THE SECRETARY OF THE INTERIOR TO COMMISSION APPOINTED BY HIM UNDER THE DECREE OF FEBRUARY 3, 1896. (REPORT FROM INTERIOR DEPARTMENT OF NOVEMBER 21, 1907.)

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 20, 1896.

WILLIAM CLIFTON, ROBERT H. KERN, WILLIAM B. THOMPSON, *Commissioners.*

GENTLEMEN: By the terms of a decree of the Court of Claims filed February 3, 1896, by the said court as the final decree in case 17209, entitled *Moses Whitmire, trustee for the Freedmen of the Cherokee Nation,* v. *The Cherokee Nation and the United States, for certain claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, etc.,* it was ordered and adjudged that for the purpose of ascertaining and determining who are the individual freedmen of the Cherokee Nation now entitled to share in the distribution of the sum of $903,365 awarded them, the Secretary of the Interior was authorized to appoint three commissioners—one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation—to proceed to the Cherokee country and hear the testimony both for and against the identity of all the freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of said $903,365 that may be offered by the respective parties to said suit.

Pursuant to the aforesaid decree and in compliance with the directions contained in letter of the honorable Secretary of the Interior under date of February, 1896, you are informed that you have been appointed the members of said commission, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution aforesaid, that may be offered by the respective parties to said suit.

By the ninth article of the Cherokee treaty of July 19, 1866 (14 Stats., p. 801), the Cherokees agreed—

> that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: * * *

and it appearing to the court that under the provisions of said article 9 the aforesaid freedmen and free colored persons were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood, it was adjudged and decreed that the complainants in said suit and those whom they represented, being the freedmen and free colored persons aforesaid and their descendants living and in being on the 3d day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation, it being understood that the

freedmen and their descendants and free colored persons above referred to should include only such persons of said class as had not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of said decree.

The commission before entering upon its duties under their appointment must qualify by each member thereof taking an oath before any United States commissioner, or otherwise, that he will faithfully perform the duties of his said office.

The commission will be governed by the following rules and directions in the discharge of the duties prescribed for it in said decree:

That you may have the same power to administer oaths to witnesses, to compel the attendance of the same, to compel the production of written testimony, and to determine the admissibility of all evidence offered as the Court of Claims would have in making the investigation prescribed for said commission. You will also be appointed commissioners of the Court of Claims to take said testimony and to administer oaths.

You will, as soon as practicable, fix upon a day when the commission will meet in Washington to receive such verbal instructions as may be desired, to formulate blanks containing such items of evidence as may be decreed essential in arriving at all the facts necessary to be established to facilitate the establishment of the identity of the claimant entitled to participate in the said distribution, and to prepare a form of schedule that shall present such facts as may be held to be necessary to a ready and prompt understanding of each individual case, that will aid the Secretary of the Interior in reaching a conclusion as to his approval thereof and in identifying the persons

enrolled thereon when disbursing said money, as provided by said decree, and in the preparation of forms, handbills, circulars, etc., to be sent out to claimants.

You will at once give due public notice by advertisement in two of the most widely circulated papers in the nation, by at least two weekly insertions, and by such other methods as you may deem most effectual in reaching said claimants, such as handbills or circulars, of the times and places where the commission will hear evidence on behalf of the parties to the suit either in the Cherokee Nation or any other place that in your judgment may be necessary, most convenient to said freedmen and free colored persons.

I would suggest that in ascertaining and determining what freedmen are entitled to a distributive share of said fund the following questions be submitted to each claimant, so far as the same may be applicable to that particular case, viz:

1. When and where were you born?
2. Who were your parents?
3. Were you a slave in February, 1863?
4. If you were, what was your owner's name, and was your owner a Cherokee Indian?
5. If not a slave, but the descendant of a slave, state who were your father and mother and the names of their respective owners, and whether such owner was a Cherokee Indian.
6. Did you reside in the Cherokee Nation at the time of the treaty (July 19, 1866)?
7. If not, where did you live and when did you return to the Cherokee Nation to reside?
8. Have you lived there continuously ever since?
9. If not, state when you left the nation, how often and how long you remained away each time,

with the reasons each time for leaving and remaining away.

10. In cases of married women, give your maiden name; and if married more than once, each of your married names.

11. Where do you now reside—give post-office address?

12. How long have you lived there consecutively?

In ascertaining the identity of the freedmen and free colored persons entitled to share under this decree, you are directed by the decree to accept what is known as the authenticated Cherokee roll, purporting to have been taken by the Cherokee Nation in 1880, and make no inquiry respecting it other than to ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence must be accepted by you tending to disprove the citizenship of any of the persons whose names appear on said roll. The "authenticated Cherokee roll" referred to in the decree is alleged to be on file in the office of the Secretary of the Interior, but no such roll is on file in that office, and the only copy known to be on file that could be taken for said "authenticated Cherokee roll" is a certified copy of said roll furnished to J. W. Wallace by the Cherokee authorities when he was in the Cherokee Nation in 1889 making up his census roll of Cherokee freedmen living and in being March 3, 1883.

This roll, a copy of which is herewith furnished you, contains the names of only 1,874 persons, while the decree of the court in this case, decided March 18, 1895, fixes the number, in 1880, of Cherokee freedmen at 2,052.

In making the investigation prescribed in said decree you will confine yourselves to the identity of the following classes of persons only:

1. All persons who had been liberated by the voluntary act of their former owners or by law, who were residents in the Cherokee Nation at the time of the treaty of July 19, 1866, or who returned within six months from the date of the promulgation of the treaty, viz, February 11, 1867, and their descendants; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

2. All free colored persons who were in the Cherokee Nation at the commencement of the rebellion, and were residents in the Cherokee Nation at the time of the treaty of July 19, 1866, or who returned within six months from the date of the promulgation of the treaty, viz, February 11, 1867.

It must be further shown that all the persons identified as of either of said classes, were alive and in being May 3, 1894, and were at that time residents of the Cherokee Nation; it being understood that the freedmen and their descendants and free colored persons above referred to include only such persons of said classes as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of said decree (February 3, 1896).

In determining the identity of the persons aforesaid, a vote of a majority of the commission shall be sufficient to entitle the person to be enrolled on schedule as a beneficiary of the aforesaid fund.

You are hereby authorized to employ a competent clerk, who shall be a stenographer, at a monthly

salary of $———, and such other temporary clerical force as you may find necessary to facilitate and hasten your work. You are also authorized to rent an office in which to transact your business, to employ a competent person from time to time at a weekly salary of $———, to keep order during the time the commission is in session and taking testimony, and to attend to such other duties as may be found necessary by the commission in the prosecution of the work. The above salaries to be fixed by the commission.

It is expected that you will conclude your labors within four months from the time you qualify as aforesaid, but if before the expiration of that time you ascertain that a longer period is demanded and required to do justice to all alleged claimants you will so report the fact in ample time to the Secretary of the Interior, designating the additional length of time required in your estimation to complete the work, in order that the time may be extended if approved by him.

You will, on the completion of your labors, submit a schedule of the names of the persons determined by you as being entitled to share in the distribution of the fund of $903,365 mentioned in the aforesaid decree, with a typewritten report of your daily proceedings and of all evidence where claimant is not admitted at all or only admitted by a vote of the majority of said commission, and file stenographic notes of all testimony taken.

These instructions, with any other duties required of you by the aforesaid decree, a copy of which is herewith furnished you, you are expected to carry out fully, faithfully, and impartially, that justice may be meted out as contemplated by the Court of Claims.

Your attention is called to the following paragraph in the decree limiting the amount of expenditures to $6,500:

> And it is further directed that the amount of $6,500, or so much thereof as may be necessary, is hereby allowed for the compensation of the said commissioners and the necessary costs and expenses incidental to the ascertainment of the individual complainants by them as hereinbefore provided.

By direction of the Secretary of the Interior, your compensation will be $1,500 each for the whole work and actual and necessary traveling expenses.

Under no circumstances will you be allowed to expend more than said sum of $6,500 for your compensation and for necessary costs and expenses incidental to the ascertainment of the number of persons, etc., referred to in said decree.

Very respectfully,

D. M. Browning,
Commissioner.

Approved:
Hoke Smith,
Secretary.

Department of the Interior,
Washington, April 21, 1896.

Commissioner of Indian Affairs.

Sir: I have approved and returned herewith the draft of instructions prepared by your office and submitted with your letter of February 20, 1896, for the guidance of the commission provided in the decree of the Court of Claims in cause No. 17209 of Moses Whitmire, trustee for the freedmen of the Cherokee Nation, against the Cherokee Nation and the United

States to ascertain and determine who are the individual freedmen and free colored persons of the Cherokee Nation now entitled to share in the distribution of the sum awarded by said decree of the Court of Claims, filed February 3, 1896.

The papers accompanying your communication are herewith returned.

Very respectfully,

HOKE SMITH,
Secretary.

(1236 Ind. Div., 1896. Three inclosures.)

APPENDIX E.

INSTRUCTIONS PROPOSED BY ATTORNEY FOR CHEROKEE FREEDMEN AND SUBMITTED TO THE COURT (FILED APR. 14, 1896), AND ORDER OF COURT THEREON.

To the honorable Court of Claims:

The undersigned respectfully represents that he has spent the last few weeks in the Cherokee Nation with a view of having the case of the freedmen prepared for presentation to the commission. That he finds in many instances the former slaves of the Cherokee Nation during the rebellion were taken from that country by their owners, the Cherokees, to the far Southern States and in some instances to old Mexico. That at the conclusion of the war some of these slaves who had enlisted in the Union Army were disbanded at various points of the Union far away from the Cherokee country. That both of these classes of freedmen were left at these various points penniless and ignorant, but with no intention of abandoning their residence in the Cherokee country. That as soon as possible they returned to the Cherokee country, but some of them not within the six months' limitation specified in the treaty. That these people have resided there continuously since and been as good citizens as that country has. That Secretary Noble, when the Wallace roll was taken, instructed Wallace to enumerate this class of people, and this was done. That in the judgment of the undersigned the number of such people is only a few hundred and that it is the belief of the Interior Department, as well as of the undersigned, that to exclude people of this class would

be contrary to the spirit of the treaty and would be a bone of contention in the Cherokee Nation. That justice to all parties would be best subserved by leaving it in the discretion of the commissioners in taking testimony under the decree of this court to allow such persons to be enrolled.

The undersigned has been summoned here by the Secretary for a conference in reference to the instructions to guide the commissioners. And that whilst he has seen the letter of Judge Nott in reference to this construction, but he feels that this was perhaps given by the court without its being aware of the fact above stated. He feels his duty to his clients demands that he should ask the court for its advice as to an instruction of this character, and he submits herewith the form of an instruction which he thinks the Secretary would cheerfully give if approved by the court. (Paper marked "Exhibit A.")

The undersigned further states that he found in the Cherokee country a large number of lawyers proposing to represent the freedmen before this commission and making extravagant contracts with them. That he thereupon assumed to notify the freedmen that the decree in the case contain the following provision, "that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere." That he had that provision inserted in the decree so as to enable the trustee to employ counsel to represent the freedmen before the commission. That thereupon he agreed with the freedmen to present the construction of this provision to the court and to the Secretary, that he felt satisfied that they would decide that it was the duty of the trustee to employ an attorney to take full charge of the freed-

men's case before the commission. That in his judgment this should be done, but that the trustee will not do so unless he is advised that he can pay such attorney a reasonable compensation for his services out of the funds in this case. That the Cherokees have employed two of the ablest lawyers in the nation to represent them, and he would respectfully ask the advice of the court in this matter so the same may be suggested to the Secretary of the Interior. All of which is respectfully submitted.

ROBERT H. KERN.

EXHIBIT A.

In making the investigations prescribed in said decree, it shall confine itself to the identity of the following classes or persons only:

1. All persons who had been held in bondage by any member of the Cherokee Nation, and who had been liberated by act of law or by voluntary act of their owners, and the descendants of such, as provided in the terms of the treaty of July 16, 1866, and if it shall appear to said commission that any person or persons of the aforesaid class had been taken from the Cherokee Nation during the rebellion either by the owners thereof, or was absent therefrom during said time because of his or their belonging to either of the armies that were engaged in the late rebellion, and were unable to return to the Cherokee Nation within six months after the conclusion and ratification of the treaty referred to in the decree in said cause, of date July 16, 1866, because of circumstances beyond their control, but returned as soon as practicable, then no such person shall be excluded by said commission from the roll to be prepared by it, but the

same shall be placed thereon, as well as the descendants of such.

2. All free colored persons who were in the Indian Territory at the commencement of the rebellion and were residents thereof at the time of the treaty of July 16, 1866, or who returned thereto within six months after the conclusion and ratification of said treaty.

3. All of the aforesaid classes who were reisdents of the Cherokee Nation on May 3, 1894.

ORDER.

The court is of the opinion that the act 2d March, 1895 (28 Stat. L., p. 910, sec. 11), prescribes the manner in which payments per capita shall be made and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.

The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs, February 18, 1896.

The within motion for instructions is overruled. April 15, 1896.

By the court:

WM. A. RICHARDSON,
Chief Justice.

RD 14.7.

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